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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 20.

JOHN B. NIX, APPELLANT,

vs.

THOMAS ALLEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED SEPTEMBER 2, 1881.

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1 Be it remembered, that on the first day of May, 1879, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, John B. Nix, by Joyner and Byrnes and M. W. Benjamin, Esq's, his solicitors, and filed, on the chancery side of said court, his bill of complaint against Thomas Allen, which bill is as follows:

U. S. Circuit Court, Eastern District of Arkansas.

JOHN B. NIX *vs.* THOMAS ALLEN.

Your orator, John B. Nix, a citizen of the State of Arkansas and of the eastern district of Arkansas, complaining of Thos. Allan, a citizen of the State of Missouri, alleges that Thos. Allen, upon a suit in ejectment in this court, at the last April term, recovered a judgment again him, this plaintiff, for the possession of a certain tract of land, to wit, the W. ½ of the N. E. ¼, and the S. E. ¼ of the
2 N. E. ¼ of section 30, township 15 south, range 28 west; and in said judgment it was expressly reserved, and so ordered by the court, that the rights of plaintiff to prosecute a suit in equity and to establish his equitable title thereto to said lands should not be prejudiced by the rendition of said judgment.

And to enjoin the execution of that judgment aforesaid in ejectment, your orator expressly avers that he now holds, and is the owner of, an equitable title to said lands which is prior and superior to defendant Allen's legal title; and he furthermore alleges that said defendant Allen holds his legal title in trust for your orator, and that your orator is entitled to have said Allen's legal title transferred and conveyed to him, because he says and avers that he is the son and heir of Sarah Nix. That in the year 1846 the whole of the N. E. ¼ of sec. 30, township 15 south, range 28 west, being subject to pre-emption under the laws of the United States, Sarah Nix, mother of this plaintiff, John B. Nix, together with her son, the said John B., who was then a minor, took possession of said
3 quarter section of land for the purpose of pre-empting the same, and built a house upon, and cleared a portion of, said land on each forty acres of said quarter section, and put the same under fence and cultivation, and occupied as a home and residence said quarter section, and said Sarah Nix continued to occupy the same as her home and residence until, and up to her death in, the year 1863; and your orator, Jno. B. Nix, contined to reside on and occupy the same in person with his said mother until her death, and after her death up to and including the present time.

That Sarah Nix was a citizen of the United States and of the State of Arkansas, and was in all things duly qualified to pre-empt land from the United States.

That the Congress of the United States, by an act entitled "An act granting a right of way and making a grant of land to the State of Arkansas and Missouri to aid in the construction of a railroad from a point on the Mississippi opposite the mouth
4 of the Ohio river *via* Little Rock to the Texas boundary line, near Fulton, in Arkansas, with branches to Fort Smith and the

Mississippi river," approved February 9th, 1853, granted and donated to the State of Arkansas, in trust, for the purpose aforesaid, every alternative section of land designated by even numbers for six sections in width on each side of a railroad from opposite the mouth of the Ohio river to the Texas boundary line, near Fulton, as aforesaid, but notwithstanding said act, and nothwithstanding the lands in cultivation as aforesaid were located on the line of said contemplated railroad, still they were protected to the actual settler by said act. Because in said act it was expressly provided and protected the rights of all the parties to whom the rights of pre-emption *how* attached, and your orator expressly avers that at the time of the passage of said act of Febr'y 9th, 1853, the right of pre-emption had attached to Sarah Nix, mother of your orator, in and to the whole of the NE. ¼ of section 30, township 15 south, range 28 west, of the principal meridian.

5 Your orator avers that notwithstanding the passage of said act of Feb'y 9th, 1853, donating said lands, that said lands were not in fact withdrawn from sale and market until May 19th, 1853, at which time said lands were withdrawn by Jno. Wilson, U. S. Land Commissioner. A copy of said instructions withdrawing said lands is hereto attached and marked Exhibit "A." Your orator again avers that Sarah Nix's rights as pre-emptor were expressly reserved in said act of Feb'y 19th, 1853, and on the 22nd day of April, 1853, said Sarah Nix made and filed her declaratory statements and proof, required to be made by a pre-emp*tion* under the laws of the United States, before and with the register of the land office at Washington, Arkansas, which was the proper land office to make said proof and file said declaratory statement.

The Congress of the United States desiring to further and more carefully protect the rights and interests of her pioneers who had gone into the wilderness, enduring many hardships, and

6 brought into a state of civilization wild lands belonging to her domain, and to more fully define, carry out, and protect the rights of *portions* to whom the rights of pre-emption had attached at the passage of the act of Feb'y 9th, 1853, and other similar acts passed on at the 27th day of March, 1854, entitled "An act for the relief of settlers on lands reserved for railroad purposes," which act expressly provided: *That any settler on the public lands which have been or may be withdrawn from sale in consequence of proposed railroads, and who had settled thereon prior to said withdrawal, shall be entitled to pre-empt at the ordinary minimum to the lands settled on and cultivated by them.*

Now, your orator expressly avers and states it to be a fact that Sarah Nix settled on and cultivated said lands in the years 1846 and 1847 in person, and continued to reside upon and cultivate the same until her death, in the year 1863. And your orator avers that he resided with Sarah Nix, his mother, during all

7 that time, and that he has continued to reside on and cultivate said lands ever since his mother's death, and is now residing on and cultivating said lands, said quarter section, as his home.

It was further provided by said act of the 28th day of March, 1854, that all persons to whom the rights of pre-emption had attached should prove up their rights of pre-emption according to the rules and regulations as might be prescribed by the Secretary of the Interior, and should pay for the same before the day that might be fixed by the President's proclamation for the restoration of said lands to market.

Your orator avers that Sarah Nix, in her lifetime, to wit, the 22nd day of April, 1853, did prove up her right to a pre-emption to the whole of the N.E. ¼ of section 30, township 15 south, range 28 west, in accordance with the instructions of the Secretary of the Interior in regard to proving up pre-emptions.

That she was a widow woman of limited means, and did
8 not pay for said lands at the time she proved up her right of pre-emption, but your orator avers that Benjamin Nix, guardian of John B. Nix, then a minor, did, in or about the year 1854, pay out of money that belonged to John B. Nix the sum of fifty dollars, which was intended as a part payment on the whole, but the receiver, instead of making it a part payment on the whole, issued a patent certificate to the N.E. ¼ of the N.E. ¼ of sec. 30, township 15 south, range 28 west, which was duly, and in fact, a part of the land that Sarah Nix had settled upon in the year 1846, and had continued to reside upon and cultivate, and to which she had proved her right of pre-emption.

Your orator still avers, that under the provisions of the act of March, 1854, the time for paying out a pre-emption was extended until the day fixed for the restoration of lands, in township 15 south, range 28 west, of the fifth principal meridian, which day was the fourth
day of February, 1878, as more fully appears from President's
9 proclamation, which proclamation was made on the 8th day of October, 1877, a *a* copy of which is hereto attached, marked Exhibit "B," and prayed to be taken as part hereof.

Your orator expressly avers that after said proclamation, and before the day fixed for restoration of said lands for sale by the President, he filed additional proofs of the right to pre-emption and proof of his mother's death and of his heirship before the register of the land office at Camden, Arkansas, which was the proper land office to make such proof, and paid the balance of the money due upon said pre-emption claim of Sarah Nix, to wit, the sum of three hundred (300.00) dollars, and received a patent certificate therefor; a copy of the proof and certificate is herewith attached, marked Exhibit "C," and prayed to be taken as part hereof.

Your orator avers that his pre-emption title reaches back to 1846, the date of his mother's settlement on said lands.

10 Your orator avers that all the title that Thos. Allen has, or pretends to have, or claim-, to the land aforesaid is derived from and growing out of the act of Congress approved 9th Feb'y, 1853, and the subsequent Federal and State legislation, which will be hereafter referred to, and so your orator avers that defendant's legal title is junior and inferior in law, equity, and good conscience to your orator's equitable title; and your orator avers that said de-

fendant's title was knowingly obtained in fraud of your orator's rights, and that the defendant, Allen, in law holds said title in trust for your orator, and this court should so decree.

Your orator further avers that under the act of Congress of Feb'y 9th, 1853, heretofore referred to, the lands mentioned in said act was given to the State of Arkansas for the purpose of aiding in building a railroad from a point on the Mississippi river opposite the mouth of the Ohio via Little Rock to the Texas boundary line,
near Fulton; that said act protected the rights of all parties
11 to whom the right of pre-emption had attached, and the State of Arkansas, by an act of the General Assembly, approved 16th day of Jan'y, 1855, gave said lands as prescribed by the act of Congress aforesaid to the Cairo and Fulton Railroad Company, subject, however, to certain conditions and restrictions as reserved and made by the act of Congress aforesaid. Among which was a provision to carry out the spirit and intent of the act of Congress aforesaid in regard to pre-emptions. That is to say, the act of the General Assembly expressly provided that citizens or heads of families being settlers or occupants previous to the passage of this act on the lands herein transferred and donated to the Cairo and Fulton railroad should each be entitled to a preference right of entry of any legal subdivision of said lands, not exceeding one hundred and sixty acres, which shall be upon such legal subdivisions as will include the residence of said settler, which preference right shall be at the
price of two dollars and fifty cents per acre, and which pref-
12 erence right shall exist from the passage of this act, and for three months after notice has been given for three successive weeks, in a newspaper published in the city of Little Rock, that the said lands is in market.

Your orator avers that Sarah Nix was a settler upon the lands, the ¼ section heretofore referred to, for six or seven years prior to the passage of the act of Congress of Feb'y 9th, 1853; that she was a citizen of the State of Arkansas, and the head of a family; that she was entitled to a preference right to purchase of said railroad company the N. E. ¼ of section thirty (30), township 15 south, range 28 west; that she, Sarah Nix, died in the year 1863; that your orator, John B. Nix, is her son and heir, and that he always resided with his said mother upon said lands up to her death, and then succeeding to her rights thereto and thereafter.

Your orator avers that said railroad runs through said lands and
that said railway company has never published in the city
13 of Little Rock, in any newspaper, that said lands was put in market, but said company published in a newspaper in Little Rock and did put up posters saying that lands between Little Rock and Texas, on and after the 16th day of June, 1874, would be for sale, except mineral lands and lands through which the railroad runs, a copy of which is hereto attached, marked Exhibit "D," and prayed to be taken as part herewith. And your orator avers that within three months after the date advertised for the sale of said lands he did offer and tender to the authorized agent of said railway company the sum of two dollars and fifty cents per acre for

said ¼ sec. of land, in good and lawful money of the United States, and said company refused to accept said price so tendered.

Your orator avers that in said advertisement said company expressly stated that all parties who resided on the land in 1872 should have the preference right to purchase the same; and your
14 orator avers that he lived upon same in 1872, and for many years prior thereto, and if said advertisement is to be taken as an advertisement of said land, then he had a preference right thereto.

Your orator is advised that, by reason of said tender, he in all things complied with said law, and that, by virtue of said tender, he has a preference right to said land under the State laws, saying nothing about and excepting his pre-emption title from the Government of the United States.

Your orator is advised that, on the 26th day of November, 1856, the General Assembly of the State of Arkansas passed another act, amendatory of the act of January 16th, 1855, in which it is expressly provided that said company shall take said lands subject to all the conditions, limitations, and restrictions, both of the act of Congress of February 9th, 1852, and of the act of Congress of March 28th, 1854, entitled An act for the relief of settlers on lands reserved for railroad purposes, and also enacted therein that all persons who, on the 9th day of February, 1853, occupied, by residence
15 and cultivation thereon, any tract of land within said grant, not exceeding one hundred and sixty acres, should have the right to purchase same upon certain conditions; that is to say, each claimant should, within three months after said lands were selected and confirmed to said company, and a list of plat thereof filed in the recorder's office in the county in which said lands lie, file with the auditor of State his own affidavit, and the affidavit of two disinterested freeholders of his county, describing the land and proving such occupancy, residence, and cultivation.

Your orator avers that said lands lie now in Miller county, Ark., though formerly lay in Lafayette county, until the year 1875, when Miller county was organized and created out of *of* that part of Lafayettte county by the General Assembly of the State of Arkansas, and that no list or plot of said lands has yet been filed by said company in the recorder's office of either of said counties. And your ora-
16 tor is advised, and charges the fact to be, that he never was required under said law to file any affidavits with the auditor until said plats were filed by said company in the county in which the lands were located, and the same advertised for sale according to law.

Your orator avers that the General Assembly of the State of Arkansas passed another act entitled "An act concerning the Cairo and Fulton railroad and its two branches," approved Feb. 1st, 1859, in which act, among other things, it was expressly provided that every person, who, on the 1st day of November, 1858, resided on (or) cultivated any of the lands comprised in the grant made by virtue of the act of Congress approved Feb'y 9th, 1853, may purchase from the said Cairo and Fulton Railway Company, at two dollars and

fifty cents per acre, a legal subdivision of one hundred and sixty acres, and to include the actual residence on the farm of such person as he or she choses to elect, by complying with the conditions prescribed in the act of November 26, 1856.

17 Your orator again avers that said railway company has never filed the list or plat required by said act of November 26th, 1856, and under said act the auditor was not authorized to act until said act of company's was performed.

Your orator avers that he and his mother, Sarah Nix, both resided upon and cultivated the land in controversy on the 1st day of November, 1858, and has always been willing to fully comply with said act as soon as the said company performed what they were by law required to do.

Your orator avers that the General Assembly of the State of Arkansas passed another and subsequent act, entitled "An act to protect the rights of settlers on railroad lands," approved the 28th day of March, 1871, in which it was expressly provided where any settler who, on or before the right day of March, 1870, was residing on and made improvements on lands belonging to or claimed by the Cairo and Fulton Railway Company, or its branches, shall

18 have the right to purchase the same, not to exceed one hundred and sixty acres, under the legal subdivisions of said lands, and including the homestead and improvements of such settlers, at not exceeding two dollars and fifty cents per acre, in preference to any and all other persons, from and after the passage of this act, and for three months after said lands have been advertised according to law.

Your orator avers that he was at that time, and long previous, as aforesaid, residing upon and had made valuable improvements upon the land aforesaid, and that said lands were claimed by the Cairo and Fulton Railway Company, and that your orator, in compliance with said act and laws, tendered the sum of two dollars and fifty cents per acre within three months after the said company had advertised these lands, lying between Little Rock and the Texas boundary line, for sale, which tender was made to James M. Loughborough, the land commissioner for said company, and the person duly

19 authorized to receive said sums of money.

Said advertisement was made by said company on the 16th day of June, 1874, with posters as aforesaid, and that said tender was made within the limit thereafter, as will more fully appear by the proof.

So your orator avers that he has in all things fully complied with all the Federal laws required to be complied with to perfect his title, and that having in all things complied with all the State laws requiring a compliance to perfect his title under the same, and after complying with both Federal and State laws as they arose touching his rights and having paid the United States in full for said ¼ section of land under the provisions of the act of March 28, 1854, and all other acts relative thereto, and having tendered the money to said company as aforesaid under the State laws requiring said payment or tender of the price as aforesaid.

And he expressly avers that he has a good equitable to said ¼ section of land; that is, prior to defendant's pretended legal title.

20 Your orator avers that the Cairo and Fulton Railway Company has been consolidated with other railroad companies, and is now known as the St. Louis, Iron Mountain and Southern Railway Company; that Thos. Allen is now, and was when said company made a deed to him for said lands, president of said company and railway. And your orator expressly avers that said deed to said lands was made in fraud of your orator's rights and with a view to defeat, if possible, his ownership to said land, and in fraud of your orator's equitable title and a palpable violation of the trusts, limitations, considerations, and reservations upon which said grant was made and accepted by said company, and that said Allen did not pay the consideration expressed in said deed, nor any other consideration, but that the same is wholly without consideration, and your orator prays that defendant may be compelled to answer to these allegations of fraud.

Your orator avers that said deed was fraudulent and void, and, in fact, was only colorable for the purpose of defrauding your
21 orator, and that since said deed said railway company have continued to sell portions of said lands and have exercised acts of ownership over the same as if it had never been sold, and that in fact, law, equity, and good conscience said Allen holds said deed in trust and for the use and benefit of your orator.

That your orator has made the settlements heretofore stated, and has performed the acts hertofore stated, to acquire a title; that it was impossible under the law for any one to obtain a title that would not be in trust for your orator.

Your orator avers that said judgment recovered in this court for the possession of said property or land is unjust and inequitable, and that the said Thomas Allen is about to enforce said unjust and inequitable judgment, and will proceed to do so, unless enjoined by this honorable court.

Your orator has made valuable improvements upon said land under belief that he had a good title to same, said improve-
22 ments and the land together are worth between five and ten thousand dollars, and if said Allen is allowed to enforce said judgment he will deprive your orator of nearlly all that he has accumulated during his whole life and from his posterity—that small pecuniary bequest that he had hoped to settle upon them at his death, gained and reaped from a life of toil. Your orator avers that all of the laws of the United States and of the State of Arkansas heretofore referred were binding upon said company, and any and all acts of said company in violation of said laws can in no way prejudice the rights of your orator to said land.

Your orator avers that he is wholly remediless at law. Wherefore he prays that said Thomas Allen may be temporarily restrained from executing his said judgment in this court recovered, wherein said Allen was plaintiff and your orator, Jno. B. Mix, was defendant, and that said Allen may be restrained from selling or dispos-

ing of any of said lands until the further order of this court,
23 and that upon a final hearing the injunction may be made perpetual, and that said Thomas may be declared to hold said title in trust for your orator, and that he may be required to convey said legal title to your orator, and for all proper relief, and your orator also prays for the most speedy writ of subpœna.

M. W. BENJAMIN AND
L. A. BYRNE,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

L. A. Byrne states that he is attorney for the plaintiff Nix, and that he believes the facts set up in the foregoing bill are true.

L. A. BYRNE.

Subscribed and sworn to before me, this 2nd day of May, 1879.

RALPH L. GOODRICH, *Clerk.*

24 "EXHIBIT "A."

GENERAL LAND OFFICE, *May* 19, 1853.

REG. AND REC., *Washington, Ark.*

GENTLEMEN: I have to request that you will reserve from sale or entry the following township- situated in your district, within the probable limits of selections for the railroad grants made to the State by the act of Congress approved 9 Feb'y, 1853, as ordered by the President on the 6th inst., to wit, south of the base line and west of the 5th principal meridian:

Tp's 1	to 10,	inclusive,	of range	18.
" 2	" 10	"	"	19.
" 3	" 10	"	"	20.
" 5	" 12	"	"	21.
" 5	" 13	"	"	22.
" 6	" 14	"	"	23.
" 7	" 17	"	"	24.
" 8	" 20	"	"	25.
" 9	" 20	"	"	26.
" 10	" 20	"	"	27.
" 11	" 20	"	"	28. (Here comes in 15.)
" 12	" 14	"	"	29.

25 I herewith enclose a printed diagram of the State (marked "A 1") the red shades the above-mentioned reserved townships, which you will put up in your office for convenient reference, having noted the same on your township plats and tract books, as reserved for the purpose specified, with a reference to these instructions by date. You will please to acknowledge the receipt hereof by return mail.

I am, very resp't'y, your ob't s'v't,

JOHN WILSON, *Com'r.*

"EXHIBIT B."

U. S. Land Sale (*No.* 828).

Proclamation by the President of the United States.

In pursuance of an act of Congress of June 22, 1876, I, Rutherford B. Hayes, President of the United States of America, do hereby declare and make known that a public sale of valuable Government lands will be held at the land office at Camden, in the State
26 of Arkansas, on Monday, February 4, 1878, at which time will be offered all lands not previously disposed of in the undermentioned townships, and parts of townships, viz:

South of base line and west of fifth principal meridian, in the former Champagnole, present Camden, Arkansas land district.

Townships 11, 12, 13, 14, 15, 16, 17, 18, and 19, in range 6.
Townships 11, 14, 15, 16, 17, 18, and 19, in range 7.
Townships 13, 14, 15, 16, 17, 18, and 19, in range 8.
Townships 11, 12, 13, 14, 15, 16, 17, 18, and 19, in range 9.
Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 10.
Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 11.
Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 12.
Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 13.
Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 14.
Townships 11, 12, 13, 14, 15, 16, 17, 18, and 19, in range 15.
27 Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 16.
Townships 11, 12, 13, 15, 16, 17, 18, 19, and 20, in range 17.
Townships 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 18.
Townships 11, 12, 13, 14, 15, 18, 19, and 20, in range 19.
Townships 11, 12, 13, 18, 19, and 20, in range 20.

South of base line and west of fifth principal meridian in the former Washington, present Camden, Arkansas, land district.

Townships 1, 2, 3, 3, 4, 5, 6, 7, 8, 9, and 10, in range 18.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in range 19.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in range 20.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 21.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, and 20, in range 22.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 23.
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28 Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in range 25.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 20, in range 26.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20, in range 27.

Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, and 20, in range 28.

Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, in range 29.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, in range 30.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, in range 31.
Townships 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, in range 32.
Townships 6, 7, 8, 9, 10, 11, and 12, in range 33.

Lands appropriated by law for the use of schools, military, or other purposes, or reserved for railroad purposes, will be excluded from the sale.

The offering of the above lands will be commenced on the day appointed, and will proceed in the order in which the lists of vacant lands are tabulated, until the whole shall have been offered
29 and the sales thus closed; but the sale shall not be kept open longer than two weeks, and no private entry of any of the lands will be admitted until the day after the close of the public offering.

All lands held at double minimum price will be disposed of at not less than two dollars and fifty cents ($2.50) per acre, and all lands held at minimum price will be disposed of at not less than one dollar and twenty-five cents ($1.25) per acre.

Lists of sectional subdivisions are in the hands of the local officers, and will be open for the examination of those desiring to purchase.

Given under my hand, at the city of Washington, this 8th day of October, 1877.

R. B. HAYES,
President of the United States.

By the President:
J. A. WILLIAMSON,
Commissioner of the General Land Office.

Notice to Pre-emption Claimants.

Every person entitled to the right of pre-emption to any of
30 the lands within the townships and parts of townships above enumerated is required to establish the same to the satisfaction of the register and receiver of the Camden land office, and make payment therefor as soon as practicable after seeing this notice, and before the day appointed for the commencement of the public sale of the lands embracing the tract claimed, otherwise such claim will be forfeited.

No pre-emption claimed, based on a settlement subsequent *subsequent* to the date of this proclamation and prior to the offering, will be recognized by the Government.

J. A. WILLIAMSON,
Commissioner of the General Land Office.

"EXHIBIT C."

Affidavit of J. B. Nix.

I, John B. Nix, son and heir of Sarah Nix, dec'd, claiming the

right of pre-emption under the provisions of the act of Con-
31 gress, entitled "An act to appropriate the proceeds of the public lands, and to grant pre-emption rights," approved September 4th, 1841, to the N. E. ¼ *quarter* of section number 30, of township number 15 S., of range number 28 W., subject to sale at the land office at Camden, Arkansas, do solemnly swear that she had never had the benefit of any right of pre-emption under this act; that she was not the owner of three hundred and twenty acres of any land in any State or Territory of the United States; nor had she settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to her exclusive use or benefit; and that she had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which she may acquire from the Government of the United States would inure, in whole or in part, to the benefit of any person except herself.

JOHN B. NIX.

32 I, S. W. Mallory, register of the land office at Camden, Arkansas, do hereby certify that the above affidavit was taken and subscribed before me, this 22nd day of January, A. D. 1878.

S. W. MALLORY, *Register.*

We, Joseph Ferguson and Eli H. Moores, do solemnly swear that we know Sarah Nix for 16 years previous to her death; that she was the head of a family and a citizen of the United States, and was an inhabitant of the N. E. ¼ *quarter* of section No. 30 of township No. 15 south, of range No. 28 W., and that no other person resided upon the said land, entitled to the right of pre-emption; that the said Sarah Nix entered upon and made a settlement in person on the said land since the — day of 1847, to wit, on the — day of ——, 18—, and built a house, corn-crib, stable, and other necessary improvements; and has lived in said house, and made it her
33 exclusive home from the — day of —, 18—, till the time of her death, 23d Decr., 1863; that she did not remove from her own land within the State of Arkansas to make the settlement above referred to; and that she has, since said settlement, plowed, fenced, and cultivated about 30 acres of said land, and that John B. Nix has continued the settlement and cultivation up to the present time, and that we are prevented by reason of distance from appearing before the register or receiver at Camden, and making this affidavit.

JOSEPH FURGERSON,
ELI H. MOORES.

I, William R. Kelly, clerk circuit court of Miller county, Arkansas, do hereby certify that the above affidavit was taken and subscribed before me, this 30th day of January, A. D. 1878.

And I certify that Joseph Furgerson and Eli H. Moores, whose names are subscribed to the foregoing affidavit, are persons of respectability.

[SEAL.] WILLIAM R. KELLEY,
Clerk Circuit Court, Miller County, Arkansas.

34

UNITED STATES LAND OFFICE,
CAMDEN, ARK., *January* 22, 1878.

Received of John B. Nix, heir of Sarah Nix, dec'd, who claims the rights of pre-emption of his mother, Sarah Nix, dec'd, on the N. E. ¼ sec. 30, Tp. 15 S., R. 28 W., the sum of three hundred dollars, the same being for to pay out his mother's pre-emption.

S. W. MALLORY,
Register.

"EXHIBIT D."

Copy of Poster.

Cairo and Fulton Railroad. Land Sale, Southern Division.

Notice is hereby given that the lands of the company between Little Rock and Texas boundary will be for sale at the office of the company, in the city of Little Rock, on and after Tuesday, June 16th, 1874.

Mineral lands and lands through which the road runs are reserved from sale at present.

35 Actual settlers who were living on any of the land now offered for sale prior to March, 1872, will be permitted to purchase the tracts of lands in which they live without competition.

Applications made by parties not actual settlers confer no preference rights of purchase. Where there is more than one applicant for the same tract, none of them being settlers, the land will be sold to the highest bidder, after notice to all parties.

Persons are requested to come to the office in person to make purchases, and free passes over the railroad will be given to land purchasers on the return trip to their homes.

Purchases may be made through agents duly appointed in writing. To agents free passes will not be given.

Actual settlers who have not made application to purchase are required to do so before the day of sale. Other persons desiring to purchase can file application any time. To those who have made or who may hereafter make application to purchase, a commu-

36 nication will be sent through the mail, giving the price per acre and terms of payment of the land applied for.

Hereafter applications to purchase, filed by parties not actual settlers, will be cancelled sixty days after they are filed.

(Signed) JAMES M. LOUGHBOROUGH,
Land Commissioner.

Agreed, for the purpose of this application, that the notice was published in the Little Rock Gazette, from the 15th day of April, 1874, to June 16, 1874.

BYRNES & BENJAMIN,
For Plaintiffs.
J. M. MOORE,
For Defendant.

May 1, 1879. Good for costs.

M. W. BENJAMIN.
L. A. BYRNE.

Endorsed: May 1, 1879. Ralph L. Goodrich, clerk.

37 And on May 2, 1879, the following notice was filed, to wit:

Notice for Injunction.

In re JOHN B. NIX *vs.* THOS. ALLEN.

To Thos. Allen and to Jno. M. Moore, his attorney of record:

You will hereby take notice that the plaintiff, Jno. B. Nix, will, by his attorneys, appear before the Hon. H. C. Caldwell, judge of the United States court in and for the eastern district of the State of Arkansas, at chambers, and in the city of Little Rock, Arkansas, on Thursday, the 1st day of May, 1879, at 2 o'clock p. m., and then and there apply for a temporary injunction against the said Thomas Allen to restrain him from enforcing a judgment heretofore recovered on the law side of said court, in ejectment, for the possession of the west half of the NE. qr. and the SE. qr. of the northeast qr. of section 30, township 15 south, range 28 west, and to further
38 enjoin said Allen from selling, or in any way disposing said lands until the equitable title thereto is fully settled, and for other purposes.

L. A. BYRNE AND
M. W. BENJAMIN,
Nix's Attorneys.

Return of Marshal.

I have served the within notice by delivering into the hands of John M. Moore, Esq., attorney of record for Thomas Allen in the within cause, a true and correct copy of the same, at Little Rock, in the eastern district of Arkansas, upon this 28th day of April, 1879.

JAMES TORRANS,
U. S. Marshal.
By J. F. BROWN, JR.,
Deputy.

Service	$2 00
Copy	30
Mileage	25
	$2 55

Endorsed: Returned and filed May 2, 1879. Ralph L. Goodrich, clerk.

39 On July 2, 1879, the following answer was filed, to wit:

JOHN B. NIX *vs.* THOMAS ALLEN.

The defendant, for answer to the bill of complaint exhibited against him by the complainant, or to so much thereof as he is advised is material for him to answer, says:

It is true as alleged that defendant, on the — day of April, 1879, recovered judgment in ejectment in this honorable court, on the law side thereof, against complainant, for the lands described in

complainant's said bill. It is all true that said land was granted by Congress to the State of Arkansas to aid in the construction of a railroad between the termini mentioned in said bill, and that the same was granted by the State of Arkansas to the Cairo and Fulton Railroad Company by an act of the General Assembly, approved the 26th of November, 1856, upon certain conditions reserved
40 in the sixth section of said act, whereby said company was required to grade twenty-five miles, or complete ten miles of said road, at its option, within two years from the passage of said act.

And that the General Assembly, by an act approved the 1st day of February, 1859, released the said company from the performance of the aforesaid conditions. That by the provisions of the act of the 26th of November, 1856, there was reserved to actual settlers who resided on said lands on the 9th day of February, 1853, and cultivated the same, the right to purchase from said railroad company at the price of two dollars and fifty cents per acre, the legal subdivision of said land which included his residence and actual improvements not to exceed one quarter section.

It was further provided in said act that to entitle settlers to the benefits of the foregoing provisions of said act they should, within three months after such lands were selected and confirmed to said railroad company, and a list or plat thereof filed in the re-
41 corder's office of the county in which such lands were situated, file with the auditor of State their own affidavit, accompanied by the affidavits of two disinterested freeholders of the county, describing the land claimed by legal subdivisions; and the right was reserved to said railroad company to controvert the facts set forth in said affidavits before the auditor, upon notice to the complainant; it was further provided that in case of failure to file said proof within the time specified, the right to make such purchase should cease. That under the provisions of the act of February 1st, 1859, similar rights were reserved to actual settlers who resided on and cultivated any portion of said lands, on the 1st day of November, 1858, and subject in all respects to the foregoing conditions contained in the act first above referred to.

He further agrees that it is true that the aforesaid Cairo and Fulton Railroad Company was consolidated with the St. Louis
42 Iron Mountain Railroad Company, a corporation organized under the laws of Missouri, and thereby formed the St. Louis, Iron Mountain and Southern Railway Company, which, by the terms and effect of said consolidation, acquired all of the aforesaid lands granted by the State to the Cairo and Fulton Railroad Company. That the St. Louis, Iron Mountain and Southern Railway Company, on the fourteenth day of May, 1875, sold and, by its deed of that date, conveyed the land mentioned and described in complainant's bill to defendant for the consideration of twelve hundred dollars, which was by him paid to said company. That at the time of said purchase and the payment of the aforesaid consideration, defendant had no knowledge whatever that complainant was or claimed to be a settler on said land, or any part thereof, or that he was as-

serting any right to purchase the same from said company under the provisions of the aforesaid acts of the General Assembly of said State, nor did defendant acquire any knowledge thereof until
43 he had purchased and paid for said land, and the same had been conveyed to him as aforesaid. And defendant herewith files a copy of the deed executed to him by said company, marked "Exhibit A."

Defendant further alleges that the land mentioned and described in complainant's bill was situated in the county of Lafayette until the — day of ——, 1875, when by an act of the General Assembly the county of Miller was created, and embraced that part of the territory of Lafayette county in which said land was situated; that the aforesaid railroad was completed and in operation in 1873.

That prior to the 18th day of January, 1858, the lands of the Cairo and Fulton Railroad Company, within the county of Lafayette, including the land described in said complaint, were selected and confirmed to said company, and on said day a list of said lands was filed in the recorder's office of said county, a certified copy whereof is herewith filed, marked "Exhibit B."

And defendant avers that the complainant did not, within
44 three months after the filing of said list in the recorder's office, as aforesaid, and has never filed in the office of the auditor of State, the affidavits of himself, or other persons, as by the provisions of said acts he was required to do, in order to preserve the rights reserved to settlers on said lands, nor did the said Sarah Nix, under whom complainant claims said land, file any proof whatever of occupancy.

Defendant further alleges that certified lists of said land was made out and furnished to said Cairo and Fulton Railroad Company by the Secretary of the Interior, in the year 1858; that the aforesaid railroad was completed in the year 1873, as required by the acts of Congress granting lands in aid of its construction, and the said company became entitled to dispose of said lands. That on the 15th day of April, 1874, the Cairo and Fulton Railroad Company advertised the lands granted to it as aforesaid, being between the city of Little Rock and the Texas boundary, which included the aforesaid lands for sale.

45 And defendant denies that complainant did, as soon as said company was in a condition to sell said land, or within three months after the same was advertised for sale as aforesaid, offer to buy the same from said company, or tender two dollars and fifty cents per acre, or any other sum, in payment therefor.

And defendant further denies that *that* the complainant or the said Sarah Nix did, on the 9th day of February 1853, or the 1st day of November, 1858, reside on or cultivate any improvement on the aforesaid lands; he also denies that complainant has at any time since erected improvements of any considerable value on said land, or any part thereof.

Defendant does not know whether the said St. Louis, Iron Mountain and Southern Railway Company is selling or has sold any part

of said land, but if the same is true such sales were without the knowledge or authority of defendant.

He denies that the complainant has a right of pre-emption
46 in said land, and states the fact to be that the complainant was, at the time the same was granted to the State of Arkansas as aforesaid, and by the State to the Cairo and Fulton Railroad Company, and long after, a minor, and incapable of acquiring a pre-emption in the public lands; that the said Sarah Nix, on the 20th day of April, 1853, and after the grant of said lands by Congress to the State of Arkansas, filed a declaratory statement on the whole of the northeast quarter of said section, and subsequently, on the 31st day of March, 1854, filed her proof and made payment on the northeast quarter of the northeast quarter thereof, but as to the remainder of said tract, which is the land in controversy, she abandoned any right she may have acquired by her declaratory statement, and never afterwards asserted any pre-emption thereto or made or offered to make proof and payment therefor.

Defendant herewith files copies of said declaratory state-
47 ment and of the certificate of entry issued thereunder by the register of the land office in said district, marked respectively "Exhibits C and D."

He denies that the complainant at any time acquired or enjoyed any right of pre-emption to said land, and avers that the proof and application filed by complainant to purchase said land on the 22nd of January, 1878, was based wholly on the alleged right of the said Sarah Nix, and not upon any right of pre-emption vested by law in the complainant.

Defendant further states that under the provisions of an act of Congress entitled "An act for the disposal of the public lands for homestead, * * * * * &c.," approved June 21st, 1866, said land was withdrawn from entry under the pre-emption law, that the said Sarah Nix, nor any one for her, or claiming under her, having at the time of the passage of said act made proof or payment under the alleged right of pre-emption, defendant is advised and so so avers that if she acquired any right under the pre-emption laws, it was thereby cut off and destroyed.

48 And defendant having fully answered said bill, reserves a demurrer thereto, and for cause of demurrer says said bill contains no equity wherein this court can ground and decree or grant him the relief therein prayed.

J. M. MOORE,
For Defendant.

John M. Moore states that the defendant is non-resident and absent from said State, that he is agent, and he believes the allegations of the answer to be true.

JOHN M. MOORE.

"EXHIBIT B" TO ANSWER.

Six-mile reserve. Land belonging to the Cairo and Fulton Railroad Company. Lafayette county, Arkansas.

Pt. of Sec.	*Sec.*	*Town.*	*Range.*	*Acres.*
NE. ¼	8	14 S.	26 W.	33.78, South of Red River.
*	*	*	*	* * *
SE. of NE. ¼	30	15	28	40.00, 2.
W. ½ of NE. ¼	30	15	28	80.00
NW. ¼ & SE. ¼	30	15	28	244.10
*	*	*	*	* * * *

49 OFFICE OF CAIRO AND F. R. R. Co.,
LITTLE ROCK, ARKANSAS, *January* 18, 1858.

I hereby certify that the foregoing list, from pages one and to two, inclusive, is a true and correct copy from the original list of the tracts of land within the six-mile limit granted to the C. and Fulton Railroad Company, as certified by the Commissioner of the General Land Office July 13, 1857.

EDW. CROSS, [L. S.]
President.
RICHARD FATHERLY,
Sec. C. & F. R. R. Co.

(Endorsed:) Filed in my office on the 30th day of January, A. D. 1858. J. M. Montgomery, clerk & recorder. By C. J. Steele, D. C.

STATE OF ARKANSAS, *County of Lafayette.*

I, Henry Moore, clerk of the circuit court of Lafayette county and *ex-officio* of said county, do hereby certify that the foregoing is a true and correct copy of the list of lands of the C. and F. R. R.
50 therein set out, with the certificate appended and the endorsement of filing thereon, as the same appears upon and from the said list now on file in my office.

Witness my hand and seal of office, this 5th day of April, A. D. 1876.

[L. S.] HENRY MOORE, *Clerk.*

"EXHIBIT C" TO ANSWER.

Declaratory statement of a settler on lands subject to private entry at the date of settlement, required by the 15th section of the act of 4th September, 1841, for cases where, at the date of the law, the land claimed was subject to private entry.

I, Sarah Nix, of Fayette county, Arkansas, being the head of a family, over the age of 21 years, have, since the first day of June, 1840, to wit, on the 1st day of April, A. D. 1853, settled and improved the northeast quarter section number 30, in township number 15 south, of range number 28 west, in the district of lands subject to sale at the land office at Washington, Ark., and con-
51 taining one hundred and sixty acres, which land was subject

to private entry at the passage of the act of 4th of September, 1841, and I do hereby declare my intention to claim the said tract of land as a pre-emptian right under the provisions of said act of 4th September, 1841.

Given under my hand, this 20th day of April, A. D. 1853.

SARAH NIX.

In presence of—
AQUILLA CARR.

Filed 22nd April, 1853. WM. H. ETTER, *Reg.*

U. S. LAND OFFICE,
CAMDEN, ARK., *May 8th*, 1879.

I certify that the within is a true copy of the original declaratory statement of Sarah Nix, on file in this office.

S. W. MALLORY, *Register.*

EXHIBIT D TO ANSWER.

No. 7987. LAND OFFICE AT WASHINGTON, ARK.,
March 31st, 1854.

52 I, Sarah Nix, of Lafayette county, Arkansas, do hereby apply to purchase the northeast quarter of the northeast quarter of section thirty (30), in township fifteen (15) south, of range twenty-eight (28) west, containing forty (40) acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of one dollar and twenty-five cents per acre.

I, Benj. P. Jett, register of the land office at Washington, Ark., do hereby certify that the lot above described contains forty (40) acres, as mentioned above, and that the price agreed upon is one dollar and twenty-five cents per acre.

BENJ. P. JETT, *Register.*

U. S. LAND OFFICE,
CAMDEN, ARK., *May 8*, 1879.

I hereby certify that the within application is a correct copy of the original on file in this office.

S. W. MALLORY, *Register.*

Endorsed: Filed July 2, 1879. Ralph L. Goodrich, clerk.

53 On July 26, 1879, were filed the following affidavits A, B, C, D, E, F, G:

Affidavit A. John B. Nix.

I am the son and heir of Mrs. Sarah Nix, who departed this life on the 23d day of Dec., 1863, and was a native of South Carolina. She moved from South Carolina in the year 1845, lived one year in Texas, Bowie county, and in the fall of the year 1846 she moved into Arkansas and made a settlement on the N. E. ¼ of Sec. 30, T. 15, R. 28 west, where she continuously resided until her death. She built on said N. E. ¼ good, substantial cabins, and cleared up and culti-

vated about 40 acres, which embraced portions of each of the legal subdivisions of said N. E. ¼, and often expressed her intention to pre-empt the same, and accordingly, on the 22d day of April, 1853, she filed her declaratory statement in the local land office at Washington, Hempstead county, Ark., and is numbered 218, to the best of my recollection. I know of my own certain knowledge
54 that my mother, Sarah Nix, did not on the 31st day of March, 1854, or at any time either before or after that date, appear before the register at Washington and make affidavit and proof of settlement and cultivation, &c., and pre-emption cash entry, for the N. E. ¼ of the N. E ¼ of said section.

It appears from the records of the Land Office at Washington, D. C., that she appeared before Benj. P. Jett, register, on the 14th day of November, 1854, and made the affidavit required by law to enter the N. E. ¼ of the N. E. ¼ of Sec. 30, town. 15, range 28; I know of my own personal knowledge that this record is not true; I was then about 18 years old, the only son, and living with her, and if she had gone to Washington at that time or any other I would have known it. Benj. Nix was my guardian at that time, and as such guardian received from my grandfather's estate fifty dollars. This money he paid to the receiver at Washington, and took his receipt therefor, on her pre-emption claim on the N. E. ¼ of said section.

When my mother, Sarah Nix, made her settlement on the
55 said N. E. ¼ I was about 10 years old; I lived with my mother until her death in 1863, and have continued to reside on the said N. E. ¼ up to the present time. It is my home now, and has been since 1846.

In 1874 the Cairo and Fulton Railroad Company advertised to sell their lands between Little Rock and the Texas boundary line, and invited actual settlers to come up and pay for their lands. I went to Little Rock within the time limited, to wit, on the 28th day of July, 1874. The commissioner, James M. Loughborough, refused to sell to me the N. E. ¼ of Sec. 30, T. 15, R. 28 west, at any price. I then made him a tender of the money, $400, in legal tender notes of the United States, counted out the money in his presence, offered him the money which he refused to take, but he admitted in the presence of Joseph Furguson, R. F. Mays, and Joseph F. Kirley that it was a sufficient legal tender for the said N. E. ¼ at $2.50 per acre. Col. Loughborough asked me if I knew what I was doing; I replied, I thought I did. He then remarked if I made a
56 tender I would loose my preference right to purchase the said land, and that he would not sell it to me at any price, but would sell it to the first man that came along and wanted to buy, and he sold the land to Thomas Allen, one of the officers of the company, who then brought suit against me for possession.

During the pendency of said suit, to wit, in October, 1877, the President of the United States, by his proclamation, restored to market all the lands in the Camden land district, and ordered sale to begin on the 4th day of February, 1878. Before that time, to wit, on the 22d day of January, 1878, I went to Camden before the register, the receiver being absent, and as the heir-at-law of Sarah

Nix, dec'd, and made the proof of settlement and payment as required by law, and took a receipt therefor.

JOHN B. NIX.

Subscribed and sworn to before me, on this 11th day of July, 1879.

[SEAL.] WILLIAM R. KELLEY,
Clerk Miller Co., Ark.

Endorsed: Filed July 26, 1879. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

57 *Affidavit "B" of Joseph Furgerson.*

I have lived in the vicinity where John B. Nix now resides for the past forty years or more; am now a resident of Miller Co., Ark. I have known John B. Nix ever since about the year 1847. I knew his mother, Sarah Nix, in her lifetime. I first knew her about said year 1847, she with her son, John B., was then residing on and improving the northeast quarter of section 30, T. 15 S., R. 28 W., then Lafayette, now Miller, county, Arkansas, a place where they continued to reside and cultivate and improve together up to the death of Sarah Nix, which occurred about the year 1863, and that her son, John B. Nix, has continued to reside on and cultivate said lands ever since his mother's death up to and including the present time. I know of my own knowledge that Mrs. Sarah Nix never had any other home or lived anywhere else since my first acquaintance with her in said year 1847, then on said tract of land before de-
58 scribed, and from the time of her settlement up to her death, and that John B. Nix has never had any other home from date of settlement aforesaid up to the present time; that he now lives on and cultivates the identical tract of land as his home, and has made valuable improvements thereon.

That at the time and date of settlement of Mrs. Nix aforesaid John B. Nix was then a boy, and that he was the imputed son and heir of Mrs. Sarah Nix.

And he further deposes and says, that about the latter part of the month of July, in the year 1874, I, in company with the plaintiff, John B. Nix, R. F. Mays, and Joseph F. Kirby, went to Little Rock, Arkansas, where then the land office for the southern division of the Cairo and Fulton railway was located and soon after ariving at said city the persons above-named called at the land office of said railway company, and I saw Mr. John B. Nix, in the presence of the company, tender to James M. Loughborough, the acting land commissioner for said company, the sum of two dollars and fifty
59 cents per acre for the northeast qr. of said section 30, and proposed to pay for the same, and asked Mr. Loughborough to accept it and make him a deed to it, which was refused by Mr. Loughborough, and he remarked to Mr. Nix that if he did make him a tender on the land, that he would debar him of any right to purchase the same. The offer to pay and tender was made on the

home and residence of Mr. Nix, to wit, the N. E. ¼ of Sec. 30, T. 15 S., R. 28 W. Miller Co., Ark.

JOSEPH FURGERSON.

Sworn and subscribed to before me, on this 8th day of July, 1879.
[SEAL.] WILLIAM R. KELLEY,
Clerk, Miller Co., Arkansas.

Endorsed: Filed July 26, 1879. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

60 *Affidavit C of R. F. Mays.*

I have been a citizen of Lafayette and Miller counties, Arkansas, ever since the year 1852, and I have lived a neighbor to Mr. John B. Nix ever since that time. John B. was at the time of my first acquaintance with him, living with his mother, Sarah Nix, and they resided on the northeast quarter of section 30, T. 15 S., R. 28 W., in then Lafayette, now Miller, county, Arkansas.

I knew his mother, Sarah Nix, from the date aforesaid up to her death, which occurred about the year 1863. From the time I first knew her she, (Sarah Nix,) with her son John B., always resided on and cultivated the above tract of land as their home, living at no other place, and that after the death of Sarah Nix, John B., her son and heir, lived on said place or tract of land with his family up to and including the present time, and that he is now living on and cultivating the same as his home and residence.

61 In the year 1874 I saw where the Cairo and Fulton Railroad Company had advertised by posters that on and after the 16th day of June of that year that all lands belonging to said railway company lying south of Little Rock, Arkansas, would be for sale, and that all parties residing on said lands as actual settlers were notified to come forward and pay for their lands, or their preference right would be barred; and soon thereafter I, in company with plaintiff, John B. Nix, Joseph Furgerson, and Joe F. Kirby, went to Little Rock, Ark, where the land office of said railway company was located, and on the day of the 28th of July, 1874, the company, consisting of the above-named individuals, called at the land office of the said railway company, when and at which time I saw and heard Mr. Nix offer to buy of Mr. James M. Loughborough, the land commissioner and attorney-in-fact for said company, the tract of land on which he then lived, to wit, the N. E. ¼ of Sec. 30, T. 15 S.,

62 R. 28 W., then Lafayette, now Miller, county, Ark., and offered Mr. Loughborough two & $\frac{50}{100}$ dollars per acre, which was refused by Mr. Loughborough. Mr. Nix then tendered him that price for the tract of land in good and lawful money of the United States, which was refused by Mr. Loughborough. I saw Mr. Nix count the money in the presence of the party and that of Mr. Loughborough, and it consisted of $2.50 per acre on 160 acres, the tract above described. The money tendered was U. S. Treasury notes. It was offered to him, which was refused as aforesaid.

I know that the tender was made on the 28th day of July, 1874,

for I had business at said office, and entered into a contract that day, and a few minutes after it was made, for the purchase of lands of said company.

RICHARD F. MAYS.

Affidavit D of Eli Moores.

I am a citizen of Bowie county, Texas, and reside about
63 one mile from Texarkana, and have lived on the place, where I now reside, for about forty years. I knew Mrs. Sarah Nix, the mother of plaintiff, John B. Nix, she settled on N. E. ¼ of section 30, township 15, range 28, about the year 1847, and know that she continued to live on said quarter section of land until her death, and had no other home or place of residence, she built a house and out-houses, cleared and cultivated a good large field, but I do not know how many acres. I knew the plaintiff, John B. Nix, when a boy, and have known him ever since, to the present time. He lived on the said N. E. ¼ section, with his mother until her death, and has continued to live on said land from that time to the present, and has had no other home or place of residence. His residence has been continuous from his boyhood, and he has had no other home. He is the son and heir of Sarah Nix. I know that Mrs. Sarah
Nix was raised in the State of South Carolina; she was a
64 widow when he moved to the State of Arkansas and settled upon the said N. E. ¼ section.

E. H. MOORES.

Affidavit E of James T. Hogane.

I am a citizen of Texarkana, Miller county, Arkansas; am a practical surveyor, and until recently was county surveyor of Miller county; I am well acquainted with all the subdivisional lines of section 30, T. 15 S., R. 28 W., on which a part of the town of Texarkana is located; I have run the subdivisional line of the N. E. ¼ of said section, and know from said survey, made in 1875, that the original Nix farm embraces a part of each legal subdivision of the said N. E. ¼ of Sec. 30, T. 15 S., R. 28 W. A part of the farm appears to be very old, and has been the home of John B. Nix, occupied and cultivated ever since my acquaintance with him in the year 1864. In 1875 I was appointed local agent for the sale
65 of lots in Texarkana by the St. Louis, Iron Mountain and Southern R. R. Co., and sold a great many lots for said company, and, among the number, I sold to Stanley McCartney two lots in the name of said railway company as vendor, which lots were located on the northeast qr. of said Sec. 30, and the portion of the purchase-money paid to me by said McCartney was turned over by me to the agents of said company, Mr. Bruntley, when I settled up my accounts with the company.

The sale of lots made by me to said McCartney was on the 13th day of May, 1875; the sale was not ratified at that time by James M. Loughborough, the land commissioner of the St. Louis, I. M. &

S. R. W., owing to my having set the price of the lots below the schedule price.

JAMES. T. HOGANE.

Affidavit F of Thomas Orr.

I am citizen of Miller county, Arkansas, and have been
66 for fourteen years past. I am thirty-five years of age. I am a practical surveyor, and was, in the year 1872, county surveyor. I have known John B. Nix, plaintiff, about fourteen years; he resided on the northeast quarter of section 30, township 15 south, range 28 west, in then Lafayette, now Miller, county, Arkansas, and he has resided on said place and improvements ever since that date.

In the latter part of the year 1874 or early part of 1875, at the request of Mrs. Nix, plaintiff, I made a survey of his land and improvements, embracing the N. E. ¼ of Sec. 30, and it was ascertained by my survey that his improvements extended over parts of each legal subdivision of said N. E. ¼ of Sec. 30; that said improvements and inclosure, including homestead and farm, comprised about 50 or more acres of land in cultivation.

From the appearance of said lands cultivated, I would suppose that the greater portion of same had been in cultivation for
67 about 25 years or more, and that said old improvement embraced parts of each forty acres of the quarter section, and the same was an inclosure.

THOS. ORR.

Affidavit G of Benj. Nix.

I am a citizen of Bowie county, Texas, and have resided in the vicinity of the place where Texarkana is now located since A. D. 1846. I was acquainted with Sarah Nix in her lifetime, and as a friend I transacted her business, and was guardian of the plaintiff, John B. Nix, and received some money belonging to my ward from his grandfather in South Carolina, and without authority of the probate court of Lafayette county, Arkansas, deposited fifty dollars of his money in the local land office at Washington, Arkansas, to be paid on the pre-emption filing of Sarah Nix, No. 218, dated April 22nd, 1853, upon the N. E. ¼ of Sec. 30, township 15, range 28 west. I know all about the trans-
68 action from first to last. I know that Mrs. Sarah Nix, the mother of the plaintiff, never went to Washington, Arkansas, before the register, Benj. P. Jett, on the 14th day of Nov., 1854, or at any other time, to make pre-emption entry on the N. E. ¼ of section 30, township 15, range 28 west, or on any other land, and anything to the contrary is untrue. I know that Mr. Sarah Nix resided on the N. E. ¼ of Sec. 30, T. 15, R. 28, from the year 1846 to the time of her death, in 1863, and had in cultivation a field or fields, which included portions of all the legal subdivisions of the said northeast quarter. I know of my own personal knowledge that she was residing on said quarter section on the 9th day of February, 1853, and also on the first day of November, 1858. I knew Mrs.

Sarah Nix in the State of South Carolina before she moved to the State of Arkansas, and her relations, and believe she was born in said State of South Carolina. I knew her from my childhood up to the time of her death, in 1863. At the time of filing her de-
69 claratory statement she was a widow and over the age of twenty-one years. I also know that the plaintiff, John B. Nix, has resided upon the said quarter section of land from the time of her death to the present time, and that he is the son and heir of his mother, Sarah Nix. And further, I know that Mr. Sarah Nix did not appear at the land office at Washington, on the said 31st day of March, 1854, and that Mrs. Nix never abandoned the said land at any time, and that the residence thereon was continuous until her death, and that the said John B. Nix resided upon said N. E. ¼ with his mother from the time of her settlement in 1846 until her death, and has continued to reside upon the said N. E. ¼ to the present time, and has had in cultivation for years about fifty acres of the same. And I will further state that there was no legal proof of settlement, as there was no witness sworn by the register or receiver; and that the said fifty dollars was received after the expiration of the time limited by law, as the 12 months had expired.

BEN. NIX.

70 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered, that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 27th day of October, anno Domini one thousand eight hundred and seventy-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 12, 1879:

On consideration of the bill, answer, and affidavits, it is ordered that said defendant, Thomas Allen, be, and he is hereby, enjoined until the final hearing of this cause, or until the further order of the court in the premises, from executing or causing to be executed, by the issuance of a writ of possession or otherwise, the judgment at law rendered in this court on the 17th day of April, 1879, in favor of the said Thomas Allen and against the said John B. Nix, for the recovery of the following described lands: The west half of northeast quarter, the southwest quarter of northeast quarter section thirty (30), township fifteen (15) south, range twenty-eight west.

71 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered, that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 25th day of October, anno Domini one thousand eight hundred and eighty, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on December 21, 1880:

Comes the defendant, by J. M. Moore, Esq., his solicitor, and on his motion it is ordered that this cause be set down for final hear-

ing on Wednesday, the 12th day of January, 1881, and that both parties have leave to take depositions up to that date.

And on January 10, 1881, the following proceedings were had, to wit:

Comes the complainant, by Joyner & Byrne, Esqs., his solicitors, and files herein his motion to correct deposition.

72 Which motion is as follows:

Your petitioner, John B. Nix, the plaintiff in the above styled action, would respectfully represent and show unto your honors that in the taking of his deposition now on file in this action, on cross-interrogatory, as to a deed from his mother, Sarah Nix, to himself, whether said deed was for the N. E. ¼ of the N. E. ¼ or for the N. E. ¼ of Sec. 30, township 15 south, of R. 28 west, he answered that it was for the N. E. ¼ of said section.

Your petitioner would further show and state that said deed had, several years prior to the taking of said deposition, been placed in the hands of his attorneys, Messrs. Gallagher and Newton, of Little Rock, and, having been lost or mislaid, he had not seen it from that time to the taking of his said deposition; that he has since had the record of deeds examined, and finds that said deed was given for the N. E. ¼ of the N. E. ¼, and not for the N. E. ¼ of said section,

73 as stated in his said deposition, and he now desires to correct said mistake, which resulted from an imperfection of memory and not otherwise.

Wherefore he prays that his petition may, on the final hearing of this cause, be read in connection with his said deposition; and as ever duty, &c.

M. W. BENJAMIN &
JOYNER & BYRNE,
For Pl'ff.

The petitioner, John B. Nix, says that the statements contained in the above and foregoing petition are true.

JOHN B. NIX.

And on January 12, 1881, the following proceedings were had, to wit:

Comes the complainant, by Joyner and Byrne and M. W. Benjamin, Esqs., his solicitors, and files herein his amended bill of complaint, and comes the defendant, by J. M. Moore, Esq., his solicitor, and files herein the agreed statement of facts, and also two pleas in bar; and the said defendant, by his said solicitor, enters

74 herein his objections to the filing of the complainant's amended bill of complaint.

Which amended bill of complaint is as follows:

Plaintiff John B. Nix, for an amendment to his bill of complaint filed in the above-styled cause against the defendant, Thos. Allen, further alleges:

That his mother, Sarah Nix, never in her lifetime made pre-emption proof to the northeast qr. of the northeast qr. of section 30,

township 15 S., range 28 west; and that any record of the register or other land officer to that effect is fraudulent and false. That the pretended proof of pre-emption by Benjamin P. Jett, register of the land office at Washington, Arkansas, bearing date November 14th, 1854, as of date the 31st day of March, A. D. 1854, to the northeast quarter of section 30, township 15 S., range 28 W., is absolutely false and untrue. That his mother never appeared before said
75 register at Washington, or any other place, and made the affidavit and proof certified to by said register. And your orator submits that his rights in the premises cannot be made to depend upon pretended acts of officers of the land department made without authority and contrary to law.

That the tender made to James M. Loughborough, land commissioner of the Cairo & Fulton Railway Company, on the 28th July, 1874, was made in good faith; that your orator is now ready and ever has been ready to pay two dollars and fifty cents per acre to said railway company; that he keeps said tender alive, and is willing to pay over the same at any moment, or bring the said sum of money into court if required.

JOYNER & BYRNE,
M. W. BENJAMIN, *Sols.*

Endorsed: Filed January 12, 1881. Ralph L. Goodrich, clerk.

76 Which agreed statement of facts is as follows:

It is agreed that the following facts may be taken as true in said cause:

That the route of the Cairo and Fulton railroad was surveyed and approved by the Legislature of Arkansas, and copies of said survey were forwarded to the proper local offices and to the General Land Office at Washington city, and that a copy of said survey was also filed in the office of the secretary of State of Arkansas, and that all of these things were done on or before the 17th day of January, 1875.

That the Cairo and Fulton R. R., nor any part thereof, was built during the ten years specified in the original land-grant act; that it was completed within ten years from the date of the act of July 26th, 1866, reviving and extending the grant, and was approved as a first-class railroad by the Secretary of the Interior.

That the land in controversy was surveyed prior to the
77 settlement thereof by Mrs. Nix.

That the notice of the sales of the lands of the Cairo and Fulton R. R. Co., which is exhibited with complainant's bill as "Exhibit D," was published by James M. Loughborough, the land commissioner of said company, in the Arkansas Daily Gazette, a newspaper published at Little Rock, and designated by the Governor of said State for the publication of official notices, from the 15th day of April, 1874, to the 15th day of June, 1874.

That the list of lands hereto appended is a true and correct abstract from the certified lists of the lands granted by Congress to the Cairo & Fulton R. R. Co., furnished to said company by the Com-

missioner of the General Land Office of the United States, with the endorsements thereon; and it is agreed that the same may be used in evidence in this cause in lieu of the original or a certified copy.

It is further agreed between the parties to this suit that the
78 Cairo and Fulton railway, now St. Louis, Iron Mountain and Southern Railway Company, in the construction of their line to the western terminus, on the boundary line between the States of Arkansas and Texas, the said railroad passes through the northeast quarter of Sec. 30, township 15 S., R. 28 W., the land in controversy between the parties to this suit.

JOYNER & BYRNE,
M. W. BENJAMIN,
For Compl't.
J. M. MOORE, *for Def't.*

EXHIBIT No. 2.

Arkansas Railroads. 59.

Parts of sections.	*Section.*	*Township.*	*Range.*	*Acres.*	*Remarks.*
* *	*	*	*	*	*
* *	*	*	*	*	*
NE. ¼ of NE. ¼	30	15 S.	28 W.	40.00	
W. ½ of NE. ¼	"	"	"	80.00	
NW. ¼ of SE. ¼	"	"	"	244.10	
* *	*	*	*	*	*

GENERAL LAND OFFICE, *July 13th*, 1857.

I, Thomas A. Hendricks, Commissioner of the General
79 Land Office, do hereby certify that the foregoing, on pages one to fifty-nine, inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Arkansas by the act of Congress, approved February 9th, 1853, entitled "An act granting the right of way and making a grant of land to the States of Arkansas and Missouri to aid in the construction of a railroad from a point on the Mississippi opposite the mouth of the Ohio river *via* Little Rock to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river," being the vacant and unappropriated lands in the alternative sections designated by even numbers, for six sections in width, on each side of the main line of said road within the State of Arkansas, and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of February 9th, 1853, subject to all its conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

80 In testimony whereof, I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed the day and year first hereinabove written.

[SEAL.] (Signed) THOS. A. HENDRICKS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *July* 14, 1857.

Approved, subject to the conditions and rights above mentioned.

(Signed) J. THOMPSON, *Secretary.*

(Copy.)

GENERAL LAND OFFICE, *July* 20, 1857.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing list, &c., on pages one to sixty-one, inclusive, is a true and correct copy of the original on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, D. C., the day and year first hereinabove written.

[SEAL.] (Signed) THOS. A. HENDRICKS,
Commissioner.

81 Endorsed: Filed January 12, 1881. Ralph L. Goodrich, clerk.

Which pleas in bar is as follows:

The defendant not confessing any of the matters in said bill contained to be true in manner and form as therein set forth, does plead thereunto; and for cause of plea says:

The complainant long before the filing of said bill pretending that he was the owner of said land, sold an undivided half interest, or some other large interest therein, to one W. H. Casey, a citizen of Texarkana, in said State, and that the said Casey now claims and asserts an interest in said lands under said purchase. Wherefore defendant says the said W. H. Casey is a necessary party to said bill and there is a non-rejoinder of parties therein.

Wherefore he prays judgment, &c.

J. M. MOORE, *for Def't.*

Endorsed: Filed January 12, 1881. Ralph L. Goodrich, clerk. By W. P. Field, D. C.

82 This defendant not confessing any of the matters in said bill contained to be true in manner and form as therein set forth, does plead thereunto; and for cause of plea says that heretofore, to wit, on the 11th day of October, 1875, the said defendant did file in this court on the law side thereof his complaint in ejectment against the said complainant, who was the defendant in said cause, which was the same action referred to in complainant's said bill, and in which this defendant, who was the plaintiff in said cause, was suing for the recovery and possession of the lands described in complainant's bill. That the complainant filed his answer in said cause, and among other defenses thereto did plead that he was rightfully in possession of said lands by reason of the pre-emption rights set up in his said bill of complaint; to which defense this defendant did interpose his general demurrer; and such proceedings were thereupon had in said cause that upon the — day of ——,

1878, the said demurrer was by the court sustained, and it
83 was held that the defendant in said cause, the complainant herein, did not have or hold any right of pre-emption in or to said lands under the aforesaid acts of Congress, which ruling remains in full force and effect; and such further proceedings were thereupon had in said cause that the defendant, the plaintiff in said action, on the 17th day of April, 1879, recovered judgment therein for the aforesaid land, a copy of which and of all the aforesaid proceedings defendant herewith files, marked "Exhibit A." And therefore this defendant pleads said judgment in bar of so much of complainant's said bill as seeks relief by reason of said alleged pre-emption rights under the aforesaid acts of Congress; and he prays the judgment of the court whether he shall make any further answer to said bill, and that he be hence dismissed with his reasonable costs.

J. M. MOORE, *Sol. for Deft.*

Endorsed: Filed January 12, 1881. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

84 And also the following affidavit:

J. K. Brantley, being duly sworn, deposes and says: I was the chief clerk in the land department of the Cairo and Fulton Railroad Company in the year 1874; James M. Loughborough was the land commissioner of said company during said year, and on the 15th day of April, 1874, the said Loughborough, as such land commissioner, advertised the lands of said company situated between Little Rock and the Texas boundary for sale in the Little Rock Daily Gazette and the Arkansas Weekly Gazette, newspapers published at the city of Little Rock.

J. K. BRANTLEY.

Subscribed and sworn to before me, the 19th day of May, 1879.
[SEAL.] E. SUTCLIFFE, *N. P.*

Endorsed: Filed January 12, 1881. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

85 And on January 14th, 1881, the following proceedings were had, to wit:

Comes the complainant, by Joyner and Byrne and M. W. Benjamin, Esqs., his solicitors, and files herein his replication to the answer of defendant, and comes the defendant, by John M. Moore, Esq., his solicitor, and files herein his answer to the amended bill of complaint.

Which replication is as follows:

John B. Nix comes and files his replication to the defendant's answer, and says that the matters and things set up therein, except such as admit the statements in the bill, are not true.

JOYNER AND BYRNE,
M. W. BENJAMIN,
Sol's.

Endorsed: Filed January 14, 1881. Ralph L. Goodrich, clerk.

86 Which answer is as follows:

The defendant, for answer to the amendment to the original bill filed herein the 12th day of January, 1881, says it is true as alleged in the answer heretofore filed by the defendant that the said Sarah Nix, the mother of complainant, did make final proof of pre-emption as to the northeast quarter of the northeast quarter of section thirty in township 15 south, range 28 west, on the 31st day of March, 1854, and did pay the sum of one dollar and twenty-five cents per acre, and obtain a certificate of entry therefor, upon which she has subsequently obtained a patent, as defendant is informed and believes. He further states that the survey of the Cairo and Fulton railroad was filed in the local land offices and in the General Land Office, at Washington, and the right of said company to said land attached on the 17th day of January, 1855, and after the abandonment by Sarah Nix of her
87 alleged pre-emption on the land in controversy in this cause.

Defendant denies that the proof of payment and the records made by the land officer in regard to the entry of the northeast quarter of the northeast quarter of said section were in any respect false or fraudulent.

Defendant denies that the alleged tender by the complainant to the Cairo and Fulton Railroad Company was made in good faith or in conformity to law.

J. M. MOORE,
For Defendant.

I am the agent of the defendant, who is absent from this State, and believe the statements of the answer to be true.

(Signed) THOMAS ESSEX.

Subscribed and sworn to before me, the — day of January, 1881.

(Signed) J. K. BRANTLEY,
Notary Public.

Endorsed: Filed January 14, 1881. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

88 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 11th day of April, anno Domini one thousand eight hundred and eighty-one, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable George W. McCrary, circuit judge, and Henry C. Caldwell district judge, presiding and holding said court, the following proceedings were had, to wit, on April 13, 1881:

Comes the complainant, by his solicitor, M. W. Benjamin, Esq., and the defendant, by J. M. Moore, Esq., his solicitor, and this cause having been agreed and submitted to the court, and by the court taken

under advisement, and the court being now well advised in the premises—

It is accordingly ordered, adjudged, and decreed, that the injunction heretofore granted in this cause be dissolved and the bill of complaint dismissed at complainant's costs; whereupon the complainant prayed an appeal to the Supreme Court, and it being agreed by counsel that the land in controversy exceeds five thousand dollars in value the same is accordingly granted.

89 And on May 13, 1881, the following proceedings were had, to wit:

Comes the conplainant, by M. W. Benjamin, Esq., his solicitor, and comes the defendant, by J. M. Moore, Esq., his solicitor, and upon hearing it is ordered that the appeal bond herein be fixed at the sum of five thousand dollars.

And on May 23, 1881, as follows:

Comes the complainant, by Joyner and Byrne, Esqs., his solicitors, and files herein his bond for appeal, which is approved by the court.

Which bond is as follows:

Know all men by these presents, that we, Jno. B. Nix, L. J. Joyner, N. Wilder, E. S. Sanderson, Joseph F. Furgerson, and Joseph F. Kirby, are held and firmly bound unto Thomas Allen, in the sum of five thousand dollars, to be paid to the said Thomas

90 Allen, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated.

Conditioned, however, that whereas the above-named John B. Nix has appealed to the Supreme Court of the United States to reverse the judgment or decree rendered in the above entitled suit by the United States circuit court in and for the eastern district of Arkansas: Now, therefore, the condition of this obligation is such, that if the above-named John B. Nix shall prosecute his appeal to effect, and shall answer all that Thomas Allen may sustain on account of the use and detention of the property, and the costs of the suit and "just damages for delay," and costs and interest on the appeal if he shall fail to make good his appeal, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

	JOHN B. NIX.	[SEAL.]
91	L. J. JOYNER.	[SEAL.]
	N. WILDER.	[SEAL.]
	E. S. SANDERSON.	[SEAL.]
	JOSEPH FURGERSON.	[SEAL.]
	JOSEPH F. KIRBY.	

Endorsed: Taken and approved as a supersedeas bond May 23, 1881. Henry C. Caldwell, district judge. Filed May 23, 1881. Ralph L. Goodrich, clerk.

On final hearing the following exhibits were filed, to wit, Nos. 12, 12, 13, 14, 15, 16, & 17:

"EXHIBIT 12."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January* 6, 1881.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the papers hereto attached, namely, letters of this office of May 19, 1853, to the register and receiver, Washington land district, Arkansas; entry papers of Sarah Nix, issued by register and receiver, Washington land district, Arkansas, March 31, 1854; certificate and receipt, each numbered 7987; letters of this office of 6th and 10th October, 1854, and February 5, 1855, to the register and receiver, Washington land district, Arkansas; pre-emption proof of Sarah Nix made November 14 before the register at Washington, Arkansas, and the endowment thereon; letter to this office from register and receiver, Washington land district, Arkansas, dated March 8, 1878, and accompanying proof of settlement of John B. Nix, heir of Sarah Nix, deceased, made January 19, 1878; letter of this office of March 25, 1878, to the register and receiver, Camden land district, Arkansas; letter of this office of June 19, 1879, to W. H. Cayce, Texarkana, Arkansas; letter of this office of July 11, 1879, to Thomas Essex, Little Rock, Arkansas, and letter of this office of June 5, 1880, to Messrs. Curtis, Earle, and Burdett, Washington city, District of Columbia, are true and liberal exemplifications of the original letters and papers on file in this office and of the originals from the records of this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

J. A. WILLIAMSON,
Commissioner of General Land Office.

(Here follows letter of Commissioner to register and receiver at Washington, Arkansas, dated May 19, 1853, which is made Exhibit A to original bill, and will be found on pages 24 and 25.)

No. 7978. LAND OFFICE AT WASHINGTON, ARK'S,
March 31, 1854.

It is hereby certified that in pursuance of law Sarah Nix, of Lafayette county, State of Arkansas, on this day purchased of the register of this office the lot or northeast quarter of the northeast quarter of section number thirty (30), in township number fifteen (15) S., of range number twenty-eight (28) W., containing forty (40) acres, at the rate of one dollar and twenty-five cents per acre, amounting to fifty dollars and no cents, for which the said Sarah Nix has made payment in full as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office, the said Sarah Nix shall be entitled to receive a patent for the lot above described.

BENJ. P. JETT, *Register.*

No. 7987. RECEIVER'S OFFICE, AT WASHINGTON, ARK'S, *March* 31, 1854.

Received from Sarah Nix, of Lafayette county, Arkansas, the sum of fifty dollars and — cents, being in full for the northeast quarter of the northeast quarter of section No. 30, in township No. 15 S., of range No. 28 W., containing forty acres and — hundredths, at $1.25 per acre.

$50. CHAS. B. MITCHELL, *Receiver.*

95 GENERAL LAND OFFICE, *Oct. 6th*, 1854.

REG. & REC'R, *Washington, Ark.:*

GENTLEMEN: There are found to be defects in many of the pre-emption cases returned by you to this office, which require that your attention should be called anew to the act and regulations of the 4th and 15th September, 1841, a copy of which is enclosed. You will therein see that the affidavit of the claimant should contain these allegations:

1st. That he has never had the benefit of any right of pre-emption under the pre-emption laws.

2d. He is not the owner of 320 acres of land in any State or Territory. It is proper also to state—

3rd. That he did not abandon his residence on his own land in (Arkansas) to reside on the tract claimed.

4th. He should describe precisely the tract pre-empted.

In the proof in the case—

96 1st. Citizenship (or a declaration, &c.,) must be alleged.

2d. That the claimant is the head of a family, (and what constitutes him such,) or widow or single man over 21 years of age.

3d. That he settled on the tract (describing it) and improved the same at such time, or before the withdrawal, and has continued, &c. No matter of fact is held to be proved which is not distinctly stated in the proof. A mere reference of the proof to the statements in the affidavits is not sufficient.

The following cases are defective in all the requisites above set forth, both in the affidavit and proof:

Zachariah R. White, No. 8027; Thomas A. Pirtle, 8031; William H. Carlton, 8030; Ely H. Riley, 8020–8029; Clement T. Smith, 8032–8033; Aleck C. Richard, 8034; John Mouser, 8037; Peter S. Garrison, 8042; James Jennings, 8043; William D. Green, 8044; Elijah Carey, 8045; Benj. F. Crow, 8054; Thomas W. Anderson, 8058; Geo. W. Bennett, 8051; Isaac Wright, 8060 & 1; William Anderson, 8086; Elihu Walton, 8087; John S. Keimnaird, 8095 & 6; Othniel Frawick, 8100 & 1; Joseph A. Corbell, 8116; George

97 W. Holder, 8120; William Gorden, 8120; John Galloway, 8124.

In none of the foregoing cases is it shown that the improvements were upon the tract that is entered.

The following cases are wanting in all the above-named requisites, except the requisite of the affidavit marked 4:

John M. Dickson, 8014; James S. Collins, 8016; Thomas Wing-

field, 8017; Robert H. Bruce, 8026; Martin Adams, 8035; Esais Baker, 8036; Green P. Bennett, 8052; John H. Swink, 8053; William Janes, 8055; Andrew Hamilton, 8057; Austin Simpson, 8056; Green Singleton, 8059.

In the case of Thomas A. Gray—8131—the papers want all the requisites except the *first* above noted of the affidavit, which is stated.

In the following cases the first and fourth of the requisites in the case of affidavits are inserted, but the others are omitted:

Thomas Barberry, 8097; Thomas I. Freeman, 8102; Jos. B. Langely, 8103; Isham T. Davis, 8119; John S. Andrews, 8129; Ansel E. Chambliss, 8136.

The papers containing the affidavits, and the proof in each
98 of the foregoing cases, are herewith returned, that the omissions may be supplied. In forwarding the papers that may be substituted to this office let your letter contain a reference to this.

I am respectfully, JOHN WILSON,
Commissioner.

GENERAL LAND OFFICE, *October* 10, 1854.

REG. & REC'R, *Washington, Arkansas.*

GENTLEMEN: The following pre-emption cases are found to be defective in the affidavit and the proof in the same particulars set forth in the letter of the 6th inst., and you are especially referred to that letter, no other specification being necessary. The affidavits and proofs are herewith returned that new ones may be substituted.

Class 1.—*Vide* Letter, Oct. 6.—John D. Johnson, 52019; D. B. James, 7728; John A. Ely, 8066.

Class 2.—Jacob Brown, 59415; Rilian Crabb, Warr. 14806;
99 William Crous, 18625; David Benkaten, 26192; William Chrodle, 25415; Henry McCroy, Cert. 8064; Nancy P. Stevenson, Cert. 8081; Joshua D. Stewart, 8068; Henry J. Hamilton, 8067; Wesley H. Green, Warr. 7495.

In the two cases following, besides the omission of all the requisites in the cases above named, the claimants, in their affidavit, do not allege their own interests, (see act Sept. 4th, 1841,) viz: Sarah Nix, No. 7897; Benjamin Nix, 7988.

In the above cases of Wesley H. Green there is also a discrepancy. The affidavit describes the S. E. $\frac{1}{4}$, but he locates the S. W. $\frac{1}{4}$ of Sec. 19, T. 10, R. 27.

In the above-named case of Jacob Brown the affidavit describes a quarter *quarter* section, while he locates the whole quarter. Let these errors be rectified in the substituted papers, and in your letter returning the same make a reference to the date of this.

I am, respectfully, &c., JOHN WILSON, *Com.*

100 GENERAL LAND OFFICE, *February* 5, 1855.

REGISTER, *Washington, Arkansas.*

SIR: Your letter of 30th Nov. last, containing the pre-emption proof of Sarah Nix, No. 7987, and Benjamin Nix, No. 7988, is received.

It has occasioned no ordinary surprise to find that the proof in these cases has again some of the same defects, to supply which the new proof was required, and which were so particularly set forth in the letter of the 6th October last, as well as in the act and circular then fo-warded. In that letter you were reminded that "in the proof in the case:" 1st. Citizenship, or a declaration, &c., must be alleged. 2nd. That the claimant is the head of a family, (and what constituted him such,) or a widow, or a single man over 21 years of age.

The new evidence, as well as the first, wholly omits these facts, although your form contains a strange perversion which makes the witnesses say that *they* (instead of the claimants) are "citi-
101 zens of the United States, and over the age of 21 years," qualifications by no means required in any witnesses, and you are desired to have the testimony again taken to supply the continued omissions in these cases, and also for the satisfaction of this office, as well as for the benefit of future claimants, to examine more attentively the acts and the instructions under them so often repeated.

Respectfully, &c., JOHN WILSON, *Com.*

REGISTER'S OFFICE,
WASHINGTON, ARKS., *November* 14, 1854.

I, Sarah Nix, of Lafayette county, Ark's, being desirous to enter northeast quarter of the northeast quarter of section thirty (30), in township fifteen south, of range twenty-eight west, in the district of lands subject to sale at Washington, Arkansas, under the provisions of the act of Congress to appropriate the proceeds of the public lands and to grant pre-emption rights, do solemnly swear that I am a citizen of the United States, a widdow, the head of a family,
102 over the age of twenty-one years; that I did, on the 1st day of April, 1853, settle and improve the above-described tract of land and erected a dwelling-house thereon, and have continued to reside there and cultivate a part of the same up to the present time; that I have not heretofore had the benefit of pre-emption from the Government of the United States, nor do I own three hundred and twenty acres of lands in any State or Territory of the United States, nor have I abandoned a residence on my own land to reside on the above-tract, and that I now apply to enter the above-described tract of land for my own use and benefit and not in any way in trust for another, but for the purpose of continued actual settlement and cultivation; neither have I made any contract or agreement with any person or persons, directly or indirectly, by which the title which I may acquire from the United States shall inure, in whole or in part, to the benefit of any person but myself, and that I have not acquired from the Govern-
103 ment of the United States, under the provisions of said graduating act, together with this entry, more than three hundred and twenty acres, according to the established survey.

Given under my hand, this 14th day of November, 1854.

her
SARAH x NIX.
mark.

Subscribed and sworn to before me, this 14th day of November, 1854.

BENJ. P. JETT, *Register.*

We, Benj. F. Ryburn and James Cardin, citizens of Lafayette and Hempstead county, Arkansas, and of the United Sates, over the age of twenty-one years, do solemnly swear that the above-named Sarah Nix settled on, improved, and erected a dwelling on the northeast quarter of the northeast quarter of section No. thirty (30), of township No. fifteen, of range No. twenty-eight, on or about the first day of April, 1853; that he has not quit nor abandoned h— residence on h— own land to reside on the public land in said State; 104 that he has resided thereon from that time until the present, and now resides thereon, and that he has about thirty acres in cultivation, and that we are not, directly or indirectly, interested in the right of pre-emption claimed by said Sarah Nix.

BENJ. F. RYBURN.
his
JAMES x CARDIN.
mark.

Sworn to and subscribed before me, this 14th day of November, 1854.

BENJ. P. JETT, *Register.*

We do hereby certify that the above and foregoing affidavits are correct and in accordance with law and instructions.

BENJ. P. JETT, *Register.*
———— ————, *Receiver.*

Answer to Com'rs Letter.

U. S. LAND OFFICE,
CAMDEN, ARKANSAS, *March* 8, 1878.

COMMISSIONER GENERAL LAND OFFICE, *Washington, D. C.*

105 SIR: We have the honor to forward herewith the proof of right of pre-emption by John B. Nix, heir of Sarah Nix, dec'd, who filed declaratory statement No. 218, dated 20th April, 1853, upon the N. E. Sec. 30, Tp. 15, S., R. 28 W. Mr. Nix appeared in person at our office and tendered said proof with the sum of three hundred dollars currency, as full payment for balance due upon said land. The S. ½ N. E. ¼ and N. W. of N. E. of said section being marked upon our plats as railroad selections, we did not feel authorized to issue the final papers in the case, but received the proof with a brief, accompanying same, and permitted him to deposit the sum of three hundred dollars to await your action in the premises.

Very respectfully, your ob't serv'ts,

S. W. MALLORY, *Register.*
A. A. TUFTS, *Receiver.*

Proof of Settlement.

106 To the Register and Receiver of the United States Land Office, at Camden, Arkansas.

HON. GENTLEMEN: In 1846 and 7, my mother, Sarah Nix, made an improvement and settled on the northeast quarter of section thirty (30), township fifteen (15 S.), range twenty-eight (28 W.), then in Lafayette, now in Miller, county, Arkansas. The farm cleared and put in cultivation embraced a part of each subdivision of the one hundred and sixty acres above described, and she cultivated and lived upon the same up to the time of her death, which occurred on the 23d of December, 1863—it being the only home she had. From the date of her death to the present time I have lived upon and cultivated her homestead, having no other home or place to live. In 1853 my mother, Sarah Nix, filed her declaratory statement on the above-described northeast quarter of Sec. thirty, township fifteen, range twenty-eight, then Lafayette, now Miller, county, Arkansas.

And also paid fifty dollars to the receiver of the U. S. land
107 office, then at Washington, Arkansas, for which the receiver gave a certificate covering the northeast of the northeast quarter above described, the remaining one hundred and twenty acres (as I was informed) being withdrawn from market on account of a proposed railroad, is now unpaid for. When the Cairo and Fulton railroad was finished, and the company advertised to sell the lands in the southern division, a part of my mother's homestead being included among those lands then advertised and offered for sale, I went to the principal land office of the company, at Little Rock, Arkansas, and in the presence of two or more witnesses tendered, in legal-tender notes of the United States, the sum of two and one-half dollars per acre for my mother's homestead, which was refused by James M. Loughborough, land commissioner of the railroad company. This tender was made about fifteen days after the land was offered for sale.

Now, in obedience to the orders by proclamation of the
108 President of the United States and the Commissioner of the General Land Office, I, John B. Nix, as the legal representative and heir-at law of my mother, deceased, Sarah Nix, I herewith tender to the United States in legal tender of the United States the Government price for that portion of my mother's homestead yet unpaid for.

All of which is respectfully submitted to you.

JOHN B. NIX.

Subscribed and sworn to before me, on this 19th day of January, A. D. 1878.

[SEAL.] WILLIAM R. KELLEY,
Clerk, Miller County, Arkansas.

STATE OF ARKANSAS, *County of Miller:*

We, Joseph Ferguson and Eli H. Moores, do solemnly swear that

we were well acquainted with Sarah Nix, the mother of John B. Nix, and also with John B. Nix, and with the facts set forth and stated in the above and foregoing proof of settlement, and believe them to be correct and true.

JOSEPH FERGUSON.
E. H. MOORE.

109 Subscribed and sworn to before me, on this 19th day of January, A. D. 1878.

[SEAL.] WILLIAM R. KELLY,
Clerk, Miller County, Arkansas.

Here follows affidavit of John B. Nix, which is made Exhibit "C" to original bill, and will be found on pages 30, 31, 32, and 33.

[4–062.]

Non-Mineral Affidavit.

COUNTY OF MILLER, } *ss:*
State of Arkansas, }

John B. Nix, son and heir of Sarah Nix, dec'd, being duly sworn according to law, deposes and says: That she was the identical person who is an applicant for Government title to the N. E. $\frac{1}{4}$ Sec. 30, Tp. 15 S., R. 28 W.; that he is well acquainted with the character of said described land, and with each and every legal
110 subdivision thereof, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

JOHN B. NIX.

Subscribed and sworn to before me, this 22nd day of January, A. D. 1878, and I hereby certify that the foregoing affidavit was read to the said John B. Nix, previous to his name
111 being subscribed thereto, and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

S. W. MALLORY, *Register.*

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 25, 1878.

REGISTER and RECEIVER, *Camden, Arkansas.*

GENTLEMEN: I have considered the application submitted by you on the 8th inst. of John B. Nix, as son and heir of Sarah Nix, deceased, to make pre-emption entry under D. S. filing No. 218, made April 22, 1853, by Sarah Nix upon the N. E. ¼ of section 30, 15 S., 28 W., Arkansas.

The records of this office show that said Sarah Nix made D. S. filing No. 218 upon the N. E. ¼ of said section 30 on April 22,
112 1853. She made pre-emption cash entry No. 7987 for the N. E. ¼ of the N. E. ¼ of said section on March 31, 1854, and patent was issued thereon Dec. 10, 1874.

The tract in question is within the six-mile limits of the grant for the Cairo and Fulton (now St. Louis, Iron Mountain and Southern) Railroad Company, the right of which attached January 17, 1855, and was included within the withdrawal ordered for the benefit of said road by letter of May 19, 1853, from this office.

On July 13, 1857, the remainder of said section, viz., the S. E. ¼ of the N. E. ¼ and the W. ½ of the N. E. ¼, was approved to the State for the benefit of said railroad under the act of Feb'y 3, 1853, approved Feb'y 9, 1853, granting lands to the State of Arkansas for railroad purposes.

Now, to wit, on January 19, 1878, John B. Nix comes forward and makes tender of $300 in payment of said W. ½ and S. E. ¼ of said section 30, and submits argument by W. H. Cager, his attor-
113 ney, claiming settlement on and cultivation of the entire tract covered by the original filing of his mother, or as stated in the application now made by him: "The farm cleared and put in cultivation embraced part of each subdivision of the one hundred and sixty acres above described, and she cultivated and lived upon the same up to the time of her death, which occurred on the 23d of December, 1863. * * * From the date of her death I have lived upon and cultivated her homestead, having no other home or place to live in."

Mr. Nix further testifies that he appeared at the office of the Cairo and Fulton Railroad Co. about fifteen days after the above land was offered for sale by said company, and made legal tender of payment for said land at two dollars and fifty cents per acre, but such payment was refused by James M. Loughborough, land commissioner of said company.

The affidavit of Mr. Nix, as also those of Jos. Ferguson and Eli H. Moore, submitted therewith, show settlement and continued residence upon and cultivation of said tract since the 25th
114 day of Dec., 1846, by Sarah Nix and said John B. Nix, as her son and heir. The proofs submitted show the erection of a house, corn-crib, stable, and necessary outbuildings, and the improvement and cultivation of about 30 acres of said land.

The proof submitted by Mrs. Nix on March 31, 1854, shows the erection of a dwelling on the N. E. ¼ of the N. E. ¼ of said section 30,

and the cultivation of about 30 acres thereof, and there is no evidence of any attempt on the part of Mrs. Nix or her son to make proof and payment for any other portion of said tract prior to the receipt of the application now under consideration.

The action of Mrs. Nix in making proof and payment for N. E. ¼ N. E. ¼ of said section only was a virtual abandonment on her part of all claim to the remaining port of said section, and it was properly treated as vacant land at the date of the attachment of the right of the road on Jan'y 17, 1855, and listed and approved for the benefit of said road accordingly.

115 The act of March 27, 1854, 10 Stat., p. 269, upon which the applicant bases his right to now prove up and pay for this land, provides:

"That every settler on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them, provided, they shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day that may be fixed by the President's proclamation for the restoration of said lands to market."

By act of 21 June, 1866, (14 stat. p. 67), it was enacted: "That from and after the passage of this act all the public lands in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida, shall be disposed of according to the stipulation of the homstead law, 20th May, 1862, entitled An act to secure homesteads to actual settlers on the public domain," and the act supplemental

116 thereto, approved 21st March, 1864. * * *

By this act the public lands therein specified were excepted from entry under the provisions of the preemption law, and even admitting for the sake of argument the inc*oh*ate right of Mr. Nix to make proof and payment for the tract in question, to have been kept alive by the act 27th March, 1854, it would be barred by the above statute, and by his failure to make proof and payment during the lifetime of the act, he is estopped from pleading said statute in support of his application now under consideration.

The act of 22d June, 1876, repealing the restriction to homestead entry only of the lands in the above-named States, does not cure the laches of Mr. Nix, nor change the status of said lands otherwise than by restoring them to pre-emption entry and location by such scrip as may lawfully be located upon unoffered land.

In conclusion, it is held that Mrs. Nix, by her action in mak-

117 ing her entry No. 7987 for a portion only of the tract covered by her original filing, was thereby estopped from making claim to the remainder thereof, as only one entry is permis-*a*ble under the act, and the Government having since disposed of the remainder of said tract, the case is *res judicata*, and the application of John B. Nix to make pre-emption entry for said land is rejected, subject to appeal within sixty days.

You will notify the parties in interest of this decision, and also

return to Mr. Nix the money deposited by him in tender of payment for the tract.

Respectfully, J. A. WILLIAMSON,
Commissioner.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 19, 1879.

W. H. CAYCE, Esq., *Texarcana, Ark.*

118 SIR: I am requested by letter of yesterday's date, from Messrs. Curtis, Earle and Burdett, of this city, to advise you of the present status of the case of John B. Nix *vs.* The Cairo and Fulton (now St. Louis and Iron Mountain) Railroad Company, involving the right to the S. ½, N.E. ¼, and N.W. ¼ N. E. ¼, sec. 30, T. 15 S., R. 28 W., Camden district, Arkansas, within the limits of the grant to the company, it being stated that the information was desired for use in a suit pending in your State courts.

The records show that on March 25, 1878, this office, by letter to the register and receiver of Camden, rejected the application of John B. Nix, as heir of Sarah Nix, deceased, to make pre-emption entry for the described tracts, subject to appeal within sixty days to the Hon. Secretary of the Interior.

On May 23, 1878, Messrs. Curtis, Earle and Burdett, for Mr. Nix, filed a request for allowance of 30 days additional in which to file appeal, which request was granted by letter to them, dated May 27, 1878.

119 On June 12, 1878, Hon. B. S. Fuller, M. C., enclosed to the Hon. Secretary of the Interior a copy of the proposed bill for the relief of Mr. Nix, and requested that no action be taken on the case pending the result of the bill. This request being referred to this office, where it was received on June 17, 1878, the case was suspended accordingly.

By your letter of the 31st ultimo, you requested for Mr. Nix, in view of probable delay in action of Congress, that an appeal be now allowed, that the Department may pass upon the case, and you further asked that Messrs. Curtis, Earle and Burdett be advised of such allowance, that they might prepare and present the appeal

Without action upon your request by this office, Messrs. Curtis, Earle and Burdett, as attorneys for Mr. Nix, filed on the 4th instant, an appeal with points of exception from said decision of this office of March 25, 1878.

Under this state of facts the case now remains for proper action when it is reached in its order.

Very respectfully, J. M. ARMSTRONG,
Acting Commissioner.

120 DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 11, 1879.

THOMAS ESSEX, Esq.,
Land Commissioner, St. Louis,
Iron Mt'n and So. Ey Co., Little Rock, Ark.

SIR: I am in receipt of your letter of the 28th ultimo, relative to

the case of John B. Nix *vs.* The Cairo and Fulton Railroad Company, now St. Louis, Iron Mountain and Southern R'y Company, involving the right to the W. ½ N. E. ¼ and S. E. ¼ N. E. ¼ 30, 15 S., 28 W., Camden district, Arkansas, and asking to be informed as to the status of the case in regard to any appeal from decision of this office of March 25, 1877, adverse to Mr. Nix.

On May 23d, 1878, within the sixty days allowed for appeal, Messrs. Curtis, Earle and Burdett, resident counsel for Mr. Nix, filed a request for allowance of thirty days additional in which to appeal, and their request was granted by letter to them on May 27, 1878.

121 On June 12, 1878, Hon. B. S. Fuller, M. C., enclosed to the Hon. Secretary a copy of a prepared bill for the relief of Mr. Nix, and requested that no action be taken pending the proposed legislation. The said request was received in this office on June 17, 1878, and action was accordingly suspended. By letter of May 31 last, Mr. W. H. Cayce, of Texarkana, Ark., asked, in view of probable delay in action by Congress, that an appeal be allowed, that the Department might pass upon the case, and that Messrs. Curtis, Earle, and Burdett be advised of such allowance, that they might prepare the appeal.

Before any action upon said request the gentlemen last named, on June 4, 1979, filed appeal and points of exception.

Under this state of facts the case now remains for proper action when it can be taken up in its order.

The appeal filed alleges error in my said decision: 1. In holding that payment made by Sarah Nix in 1854 was with a view of

122 entry of a portion of the lands heretofore claimed by her. 2. In holding that her payment and entry for a portion of the land was an exhaustion of her pre-emption right. 3. In holding that her payment and entry was a bar to further prosecution by the heirs of her right to the residue of the land. 4. In holding that the company is entitled to the lands, etc.

Respectfully,

J. A. WILLIAMSON,
Commissioner.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 5th*, 1880.

Messrs. CURTIS, EARLE, and BURDETT, *Washington, D. C.*

GENTLEMEN: Referring to your letter of the 4th instant, relative to the case of John B. Nix *vs.* The Cairo and Fulton, now St. Louis, Iron Mountain and Southern Railroad Company, involving the right to the W. N. E. and S. E. N. E. Sec. 30, T. 15 S., R. 28 W., Camden district, Arkansas, I have to state that on June 4,

123 1879, you filed in this office an appeal to the Honorable Secretary of the Interior from my decision of March 25, 1878, rejecting the application of said Nix to make pre-emption entry for the above-described land.

The case is at present suspended, pending proposed legislative action in the premises.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

Endorsed: Filed January 14, 1881. Ralph L. Goodrich, clerk.

EXHIBIT 13TH.

Deed.

Sarah Nix to John B. Nix.

This indenture, made the 22nd day of September, in the year of our Lord one thousand eight hundred and fifty-eight,
124 between Sarah Nix, of the county of Lafayette and State of Arkansas, of the first part, and John B. Nix, of the same county and State, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of fifty-three dollars (53), lawful money of the United States, to her in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all of a certain piece or tract of land lying and being in the county of Lafayette, State of Arkansas, (viz.), the northeast quarter (¼) of the northeast quarter (¼) of section No. (30), in township fifteen (15) south, range 28 west, containing forty acres, more or less, together with all and singular the tenements, hereditaments,
125 and appurtenances thereunto belonging, or in anywise appertaining, and reversions, remainder, and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, together with all the appurtenances, unto the said party of the second part, his heirs and assigns, forever, and the said Sarah Nix, for herself and her ——, the said premises in the quiet and peac-able possession of the said party of the second part, his heirs and assigns, against the said party of the first part, and her heirs, and against all and every person whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In testimony whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

SARAH NIX. [SEAL.]

Witnesses:

L. T. CULLY.

C. B. + BROWN.
his
mark.

126 STATE OF ARKANSAS, *County of Lafayette.*

Be it remembered that on the 22nd day of September, one thousand eight hundred and fifty-eight, before me, an acting justice of the peace in and for the county above mentioned, personally appeared Sarah Nix, to me personally known, and who executed the forego-

ing deed of conveyance, and acknowledged that she executed the same for the considerations and purposes therein mentioned.

THOS. J. EDWARDS, *J. P.*

I, James M. Montgomery, clerk of the circuit court and *ex-officio* recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing or "deed" was filed for record in my office on the 2nd day of October, 1858, at half past 7 o'clock p. m., and that the same is now duly recorded in "Record Book H," pages 453 & 454.

In testimony whereof, I have hereunto set my hand as such clerk and recorder, and affixed my seal at Lewisville, this 2nd October, 1858.

[L. S.]

JAS. M. MONTGOMERY,
Clerk and ex-officio Recorder.

127 Endorsed: Filed January 14, 1881. Ralph L. Goodrich, clerk.

EXHIBIT "14."

[No. 740.] *Notice to Pre-emption Settlers.*

DEPARTMENT OF THE INTERIER,
GENERAL LAND OFFICE, *March* 22, 1870.

Pursuant to instructions from the Secretary of the Interior, it is hereby ordered:

That settlers upon unsurveyed lands (including those within railroad limits settled upon prior to withdrawal) shall file their declaratory statements with the register of the proper land office, (or with the Surveyor General, where the plat has not been filed in the district office), within six months after survey in the field,

128 and shall make proof and payment within twelve months from such filing, as required by the act of June 2nd, 1862.

Where parties have already filed for lands settled prior to survey, proof and payment must be made within twelve months from the 1st day of June, 1870; at which date this notice will take effect.

Settlers prior to withdrawal on lands *surveyed* at date of settlement, within railroad limits, must file their declaratory statements within three months from said first day of June next, and thereafter make proof and payment as required by law.

Full information will be furnished upon application at the United States district land office.

(Signed) JOS. S. WILSON,
Commissioner.

LITTLE ROCK, ARK., *January* 11, 1881.

I hereby certify that the foregoing is a true and correct copy of the notice to pre-emption settlers, (No. 740) dated March 22, 1870, now on file in this office.

M. W. GIBBS, *Register.*

129 Subscribed before me, the day and date above written.

N. B. CHOWNING, *Notary Public.*

Endorsed: Filed January 14, 1881. Ralph L. Goodrich, clerk.

Here follows Exhibit 15, which is letter from J. A. Williamson, Commissioner, to register and receiver, bearing date March 25, 1878, and which will be found on pages 111, 112, 113, 114, 115, 116, and 117.

EXHIBIT 16.

Circular.

Instructions respecting rights of pre-emption settlers of public lands.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 22, 1870.

Whereas, by act of Congress, approved 27th March, 1854,
130 entitled "An act for the relief of settlers on lands reserved for railroad purposes," every settler on lands which have been, or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on, and cultivated by them: *Provided*, They shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior."

And whereas the first section of the act approved June 2nd, 1862, (12th Stat., 413,) provides "That all the lands belonging to the United States, to which the Indian title has been or shall be extinguished, shall be subject to the operations of the pre-emption act of the 4th of September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned: *Provided, however*, That when unsurveyed lands are claimed by pre-emption notice of the specific tracts claimed shall be filed
131 within six months after the survey has been made in the field, and on failure to file such note, or to pay for the tract claimed within twelve months from the filing of such notice, the parties claiming such lands shall forfeit all right thereto, provided said notices may be filed with the surveyor general, and to be noted by him on the township plats until other arrangements have been made by law for that purpose."

Therefore, in accordance with instructions from the Secretary of the Interior, it is ordered that all settlers on lands *surveyed at date of settlement*, and within the lateral limits of withdrawals for railroad purposes, where settlement was made prior to the date of withdrawal, shall be required to file their declaratory statements within three months from the first day of June, 1870, and thereafter make proof and payment, as required by law. And in all cases hereafter settlers claiming pre-emption rights upon *surveyed* lands under the act of March 27, 1854, aforesaid, shall be required to file their de-
132 claratory statements and make proof and payment in like manner as other pre-emptions, in conformity with the requirements of the pre-emption laws of 1841 and 1843.

That settlers upon unsurveyed lands, including those within the

lateral limits of withdrawals for railroad purposes, settled upon prior to withdrawal, will be required within six months after survey in the field (or if surveyed before the publication of this circular, within six months from the 1st day of June, 1870, aforesaid) to file their declaratory statements with the register of the proper land office, or with the surveyor general, where the plat of survey has not been filed with such register, and thereafter to make such proof and payment for the tract within twelve months from the date of filing, as required by the act of June 2, 1862, aforesaid.

And where settlers on lands, *unsurveyed at date of settlement*, have already filed their declaratory statements with the register of
133 the proper land office, they will be required to make proof and payment within twelve months from the first day of June next, as aforesaid.

Settlers failing to comply with the requirements of this circular, will be held to have forfeited their claims as pre-emptors under the law.

(Signed) JOS. S. WILSON,
Commissioner.

To Register and Receivers and Surveyors-General of the United States.

LITTLE ROCK, ARKANSAS, *January* 11, 1881.

I hereby certify that the foregoing is a true copy of the circular, dated March 22nd, 1870, entitled "Instructions respecting rights of pre-emption settlers on public lands," now on file in this office.

M. W. GIBBS, *Register.*

Subscribed before me, the day and date above written.

[SEAL.] N. B. CHOWNING,
Notary Public.

134 Endorsed: Filed January 14, 1881. Ralph L Goodrich, clerk.

Here follows certificate of purchase of Sarah Nix, marked Exhibit 17, which will be found on pages 93 & 94, and also application of Sarah Nix to enter lands, which will be found on pages 101, 102, 103 and 104.

On final hearing the following depositions were introduced:

Deposition of W. E. Woodruff, Jr.

Interrogatories by defendant.

No. 1. What was your occupation in the year 1874?

Ans. I was editor and publisher of the Arkansas Gazette, a newspaper published daily and weekly at Little Rock, Arkansas.

No. 2. Did you publish the printed notice exhibited with the interrogatory and marked "Exhibit A to Int. No 2"? If so, when, where, for what length of time, and in what paper did you
135 publish the same?

Ans. I did. In both editions of the Gazette, daily and

weekly. The first insertion was in the daily of the 15th April, 1874, and in the weekly of the same week, date forgotten of weekly, because I have not the file. The advertisements were published certainly till the end of April, 1874, and I think for two or three months afterwards. I have not been able to find the files later than the month of April, 1874.

W. E. WOODRUFF, JR.

Here follows Exhibit A, referred to, which will be found on pages 34, 35, and 36.

Endorsed: Opened & published January 31, 1881. Ralph L. Goodrich, clerk.

Deposition of John B. Nix.

I am the defendant to this suit; I live on section 30; I live on the N. E. quarter of the N. E. quarter of said section, town-
136 ship 15 south, range 28 west, Miller county, formerly Lafayette, Ark's; my mother, Sarah Nix, settled on this place—that is, the forty above described—in 1846. She built houses and cleared land at that time; I was a minor, and lived with my mother and worked for my mother at the time; I don't know the exact number of acres cleared, but the old field is there for itself; I think there is about forty acres; the cleared land was not all on the N. E. quarter upon which his mother was living, a portion of that field was on the S. E. of N. E., a portion on the S. west of the N. east, and a portion on the N. west of the N. east, as appears by the plat of the four forties above described, which he offers as a part of his evidence, and is marked A. He had this plat drawn by Hogan, showing the survey by the county surveyor of said land. Thos. Orr surveyed the land as county surveyor of Lafayette county Arkansas. My mother, Sarah Nix, lived on said land up to her death in 1863, and never lived anywhere else. After she made that settlement, I lived with my mother until she died. The place fell into
137 my hands after her death, and I have been living there ever since, and still live there; I have been on the place ever since 1846; never had any other home. Some time in 1854 the N. E. quarter of the N. E. quarter was entered at the United States land office at Washington, Hempstead county, Ark's, by Ben. Nix, at that time my guardian. The land was entered at that time in the name of my mother, Sarah Nix, but paid for with my money. I was a minor at the time; Ben. Nix was my guardian. In the year 1870, I cleared about 16 acres, and fenced about 15 acres of said land in 1871, of which I cultivated about 9 acres. This clearing and improvements was on the northwest quarter of the N. E. quarter of section 30, township 15, range 28 west; at the time we entered the forty we were very poor, and not able to enter any more. We did not enter any more because it ceased to be public land, having been donated to the R. R. Co. In the summer of 1874, about the last of July, I went to Little Rock to the land office of the Cairo and
138 Fulton R. R. Co. and made application to James M. Loughborough, land agent of said company, to purchase the south-

east quarter of the N. E. quarter and the southwest quarter of the N. E. quarter, and the N. W. quarter of the N. E. quarter of section 30, township 15, range 28 west, Miller county, Arkansas. I pointed out the 3 quarters above described to James M. Loughborough, agent for said company, claiming the right to purchase them as actual settler and occupant. I tendered the money—four hundred dollars United States currency—and demanded title. Said agent refused to accept the tender. When Mr. James M. Loughborough, agent aforesaid, saw that I was about to make the tender, he asked me if I knew what I was doing. I answered that I did. Loughborough then said, if you do make a tender for this land you will lose your right to purchase as an actual settler. I did not count the money myself.

139 Mr. Joseph F. Kinley, who was with me at the time, and acting as my agent and attorney, spread the money out on the table, and to the best of my recollection counted the money, to the amount of four hundred dollars, to James M. Loug-borough, agent aforesaid. The land which I pointed out above described, and for which I tendered the money, I am now in possession of. I am in possession of these lands at this time, and have been in exclusive possession since my mother's death in 1863. I have been in legal possession of said land since 1858, at which time I received a deed from my mother, Sarah Nix, to the N. E. ¼ of the N. E. ¼ of section 30, same township and range as set forth above, which deed conveyed to me all of her right and title in said land as last described. Said deed is now in the hands of my attorneys, Gallagher and Newton, at Little Rock, and, as I supposed, filed as a part of my answer in this suit. The reason I went to Little Rock in the summer of 1874, I saw that the Cairo and Fulton R. R. Co. had given notice by publication in newspapers, and by posters, to actual settlers on any of the lands donated to

140 the Cairo and Fulton R. R. Co., to come fo-ward in a given time, and prove their settlement, claim their preference rights as such actual settlers, and purchase the land from the company. The given time mentioned was 90 days from the publication. The 90 days mentioned in which settlers were to claim their rights commenced about the 16th day of June, 1874. That is what I alluded to when I said the day of publication above. The posters and publications above alluded to were signed by James M. Lougborough as agent for said company. There is 120 acres of land in controversy between myself and Thos. Allen, plaintiff in this suit. The land in controversy is the S. E. ¼ of the N. E. ¼, S. W. ¼ of the N. E. ¼, and the N. W. ¼ of the N. E. ¼ of section 30, T. 15, R. 28 W., situated in Miller county, Arkansas. I am now in possession of the three forties above described and have been all the time. They join the forty for which I have a deed. The Cairo and Fulton R. R. Co. has all the time claimed the land and have sold the timber on the land suitable for lumber.

141 At one time Mr. Hogan, agent of the Cairo and Fulton R. R. Co. give me notice that he was going to survey the land, and forbade it. I give him notice by writing him a letter, stating to him that I was in possession of the land and had a right to it; I have

been endeavoring ever since to protect said land by giving notice to James T. Hogan, agent of the Cairo and Fulton R. R. Co., not to interfere or trespass upon said lands. I herewith annex a notice, dated May 4, 1875, addressed James T. Hogan, agent above described, which notice was served upon him on said day by J. A. Roberts, sheriff of Miller county, as appears by the return of said sheriff endorsed on the back of said notice. This notice is made part of my evidence, annexed and marked B.

To each and all the foregoing deposition the plaintiff, by his *his* counsel, objects, as irrelavent and impertinent; which objection is by the commissioner overruled. Towhich ruling the plaintiff excepts.

Cross-examination:

142 Mr. Nix testifies as follows: The money that was paid for the forty acres of land I now reside upon came to me from South Carolina; it came to me from my grandfather's estate; I think I was the only one of our family that received anything of value from his estate. I think the money was received by my guardian here in Ark's early in 1854. My mother owned one slave at the time only. I suppose his value in 1854 was about one thousand dollars. Some time in 1852 or 1853 I cleared and cultivated a field right north of the N. E. ¼ of the N. E. ¼ of said section 30. I never made application to the United States Government to purchase or pre-empt any of the land in controversy. The reason I never made any application to the United States Government, I learned that this land had been donated to the Cairo and Fulton R. R. Co. and with-drawn from sale. I learn further, that in said donation that the rights of actual settlers would be protected, and learned that I would
143 have the right to purchase the land from the said Cairo and Fulton R. R. Co. at two dollars and fifty cents per acre. I never improved the N. E. ¼ of the N.W. fr'l ¼ of said section 30. I have never had any part of it in cultivation. At the time I went to Little Rock this last above-mentined forty was wild land and covered with timber. Mr. Joseph F. Kinley made the tender as described in my examination-in-chief. He did not tender the four hundred dollars for the three forties in controversy above, but for those three and the N. E. ¼ of the N. W. fr'l ¼ of said section 30. He made no other tender for me at the time, save the one of four hundred dollars for the four forties last mentioned. At no other time did Mr. Kinley make any tender for me, save the one above referred to. I think there are four or five acres of my improvements on the S. E. ¼ of N. E. ¼ of said section 30. In the S. W. ¼ of the N. E. ¼ I think I have four acres under fence, of which about two acres has
144 been cultivated. I think I commenced cultivating the new field in 1871; that is, during that year I made the first crop upon it. I have been the legal owner and in possession of said N. E. ¼ of the N. E. ¼ of said section 30 ever since some time in the year 1858; the contents of which are forty acres.

To the above deposition upon the cross-examination the defend-

ant, by his attorney, seasonably objects; the objections being overruled by the court; to which ruling the defendant, by his attorney, excepts.

Re-examined:

On the N. W. ¼ of the N. E. ¼ of said section 30 there are about five acres of the first clearing made in 1846 and 1847.

JOHN B. NIX.

145 *Deposition of J. F. Kirby.*

I am not personally acquainted with Mr. Thos. Allen, plaintiff in this suit; I am acquainted with the defendant, John B. Nix. Defendant lives in Miller county, Arkansas, near the town of Texarkana, on section thirty, township 15 south, range 28 W. Defendant's dwelling-house is upon the N. E. quarter of the N. E. quarter of section 30, same township and range as before mentioned. I became acquainted with defendant, Mr. John B. Nix, in 1859. During the summer of 1874 Mr. Nix, the defendant, Joseph Furgerson, Richard Mays, and myself went up to Little Rock and to the land office of the Cairo and Fulton R. R. Co., and requested Mr. Loughborough, land agent of said company, requested him to walk into the business office of said Co., and after one of the clerks in said office produced a plat of said land, hereinafter described, then, after looking at the plat, defendant pointed out the particular forties of land claimed by him, which is as follows, to wit,
146 the south half of the N. E. fourth and the N. W. fourth of the N. E. fourth; also the N. E. fourth of the N. W. fractional fourth of section 30, township 15 south, range 28 west, situated in county of Miller, State of Arkansas. I then stated to Mr. Loughborough that Mr. Nix had come for the purpose of making payment for said land. Mr. Loughborough then addressed himself to Mr. Nix, and asked him if he knew what he was about to do. He, Nix, answered that he did; that he had come for the purpose of paying for the above-described land, at two dollars and fifty cents per acre. Then calling on Joseph Furgerson, Richard Mays, and myself to witness the fact that he then and there offered to Mr. Loughborough, the land agent at the time of the Cairo and Fulton R. R. Company, the sum of four hundred dollars, which he refused, said amount of money having first been spread out and counted before said agent. Money tendered was United States currency, known as green-
147 back. Before this money was tendered, and at the time when Mr. Loughborough asked Mr. Nix if he knew what he was doing, he, Loughborough, further said to Nix, if he, Nix, insisted upon making the tender of payment it would forever preclude him from making any terms with said company in reference to the purchase of said land. Why the tender was made at this particular time was, that it might comply with the terms of the original grant or grants as to actual settlers and occupants upon said lands. Witness's impression is that the Cairo and Fulton R. R. Company, through their land agent, J. M. Loughborough, posted up printed notices at Texarkana and dif-erent portions of the country. On said

printed notices actual settlers and occupants were notified to come forward within sixty or nin-ty days and claim and secure their preference right as such actual settlers and occupants on any of the lands donated to said R. R. company. Those posters were
dated some time in the months of May or June, 1874,
148 and signed by James. M. Loughborough, land agent of the
Cairo and Fulton R. R. Company. From the best of my knowledge and belief, the plat of the town of Texarkana extends over a portion of the land in controversy. The land above described is worth five thousand dollars. I was familiar with the uncleared portion of land before any of the timber was taken off; character of the timber on the land was good pine timber, suitable for lumber. I have been in the lumber business to some extent, and consider the pine timber on said land suitable for lumber worth three dollars per acre. A large portion of the most suitable pine timber for lumber has been taken off of said land, and a portion of said land has been damaged to the extent of one dollar per acre by cutting off oak and hickory, said portion constituting about thirty acres. Don't remember that I have been upon said land since
about the first of November, 1875. I cannot recollect at what
149 time in the summer [of] 1874 the tender above mentioned
was made. I am certain that it was four hundred dollars that was tendered by Mr. Nix for the four-forties above named, which he offered pay for at the time. The plaintiff, Thos. Allen, has a suit of forcible entry and detainer in the United States circuit court for the eastern district of Arkansas against myself and brother as defendants. At the time of the tender as aforesaid the defendant, J. B. Nix, was living upon, occupying, and claiming to own the N. E. quarter of the N. E. quarter of section 30, in township 15 south, of range 28 west. It was over the whole tract of one hundred and sixty acres, as near as I can judge, without having actually traced the lines, that the pine timber has been cut. The oak that had been cut was entirely upon the south half of said N. E. quarter. The tender was made for the four-forties as above set forth, pointing them out at the time. The exact conversation between myself
[and] Mr. Loughborough, at the time the tender was made,
150 as near as I can recollect, was as follows: That myself and
Mr. Nix was standing near the table where the plat or survey was lying, and pointed out the particular forties that he claimed to prove the right to purchase of said company at two dollars and fifty cents per acre under the original grant or grants made to said company, which were those first above described; the tender made at the time was of the amount of four hundred dollars.

Did you make a separate tender from the one above referred to?

There was no other tender made than the one above referred to.

JNO. F. KIRBY.

Deposition of R. F. Mays.

I live four miles east of Texarkana. I am acquainted with the
defendant, J. B. Nix. I am not acquainted with Thos. Allen,
151 the plaintiff. I have been acquainted with Mr. Nix since

1852. He was living, in 1852, where he now lives, on the stage road from Rondo, Ark., to Boston, Tex., then in the county of Lafayette, now Miller county. He has never moved to any other place since I knew him. I went in company with the defendant, J. B. Nix, Joseph F. Kirby, and Joseph Ferguson, to Little Rock, Ark., and on the 28th day of July, 1874, and at the land office of the Cairo and Fulton R. R. Company, and to James M. Loughborough, land agent for said company, saw John B. Nix, the defendant, make a tender in U. S. currency of two dollars and fifty cents per acre for the land he, Nix, claimed as an actual settler, and which he designated and pointed out on a map or plat to Mr. Loughborough. Loughborough told Nix that he would not receive the tender. Loughborough asked Nix if he knew what he was doing. Nix remarked that he did. Loughborough then told Nix that if he persisted in making a tender for the land he would lose his
152 preference rights to purchase his improvements.

The larger portion of the land in controversy, as appears by the town plat of Texarkana, Ark., is laid off into town lots. The land I allude to is the N. E. ¼ of section thirty, township fifteen south, range 28 west. According to valuation of property in Texarkana, the land in dispute between Thos. Allen and John B. Nix is worth twelve thousand dollars.

The R. R. company advertised, by posting up posters and otherwise, that they would commence to sell their lands south and west of Little Rock, Ark., on the 16th day of June, 1874; said posters were signed by James M. Loughborough, land agent of the Cairo and Fulton R. R. Company.

Cross-examination:

I have in possession at home a copy of the printed poster above referred to. I don't know how much money Mr. Nix tendered; Mr. Nix proposed to count the money, and Mr. Loughborough said there was no use, for he was satisfied. The
153 tender was made by Mr. Kirby, as Mr. Nix's agent at the time. To the best of my recollection, the tender was made for three forties of land, or about one hundred and twenty acres. I stood, as I understand it, on the same footing with the Cairo and Fulton R. R. Co. in regard to certain lands as did Mr. Nix. I cannot describe from my own unaided recollection of the lands in controversy. I do not know from my own knowledge whether any of the lands in controversy had been improved prior to the completion of the Cairo and Fulton R. road.

We stayed in the land office at Little Rock but a short time, not exceeding one half hour; we were hurried out at the time in order to take the outgoing train. Our party, above described, all went into the office together, and all came away together.

R. F. MAYS.

154 *Deposition of Benjamin Nix.*

I am not acquainted with Thos. Allen, the plaintiff in this suit. I am acquainted with John B. Nix, the defendant. I have known

John B. Nix about thirty years. I know his mother, Sarah Nix. I am intimately acquainted with the family. I am cousin to the defendant. In the winter of 1846 or 1847 John B. Nix and his mother, Sarah Nix, settled in Lafayette county, Ark., upon the place where John B. Nix now resides. They settled on the N. E. quarter of the N. E. quarter, section thirty, township fifteen south, range 28 west; at said time they commenced building and improving their homestead farm. They cleared and put under fence a field of about fifteen acres; said field has been in cultivation ever since.

About the year 1852 or 1853 they entered the forty above described at the United States land office at Washington, Hemp-
155 stead county. The family was not able at the time to purchase more. As guardian of John B. Nix, I entered the land with the funds belonging to John B. Nix, said John B. Nix being a minor at the time. The receiver's receipt was taken in the name of Sarah Nix, mother of John B. Nix. Said land was deeded to him by his mother, Sarah Nix. Mrs. Sarah Nix died in 1863.

He continued to improve and clear land. The new ground last cleared was cleared in 1870. The new ground spoken of is west of the first clearing.

BENJAMIN NIX.

Deposition of Joseph Furgerson.

I am not acquainted with the plaintiff, Thos. Allen. I am acquainted with the defendant, John B. Nix. I have known Mr. Nix ever since 1847. I do not know where he lived at that time.

About 1852 I found John B. Nix and his mother living
156 on the place where he now lives. John B. Nix has been living there ever since 1852, and never lived anywhere else that I know of. Sometime in the month of July, 1874, I went in company with John B. Nix, Richard F. Mays, and Joseph F. Kirby, to Little Rock. We then went to the land office of the Cairo and Fulton R. R. Co.—the office of James M. Loughborough, and agent of said company, where Joseph F. Kirby, as agent and attorney for John B. Nix, called for a plat of land and told Mr. Loughborough, said agents, that John B. Nix had come to purchase certain land that he claimed. Mr. Nix was present and pointed out the land he claimed, and that Mr. Kirby proposed to make a tender for said land. Mr. Loughborough turned to Mr. Nix and asked him if he knew what he was doing. Mr. Nix replied that he did. Mr. Loughborough then said to Mr. Nix, if you make this tender it will forever debar you from any further rights to the land. Mr.
157 Kirby, as agent and attorney for Nix, made a tender of four hundred dollars to Mr. Loughborough, which tender was rejected. On making the tender, the money having been previously counted and lying on the table, he called Mr. Loughbough attention to the four hundred dollars as lay on the table, and told the said Loughborough that he herewith tendered him said money for John B Nix, the defendant.

Cross-examination:

I don't know how much land the defendant claimed or wished to pay for at the time of said tender. The whole four hundred dollars was tendered at that time. No other tender was made for Mr. Nix save the one of four hundred dollars.

JOSEPH FURGERSON.

Deposition of J. T. Hogane.

I am acquainted with the parties to this suit. The west
158 half of the N. E. quarter and S. E. quarter of the N. E. quarter of section 30, township 15, range 28, county of Miller, State of Arkansas, is the land in controversy, as I understand. I am acquainted with these lands. I am a practical surveyor, and am now the county surveyor of Miller county, and State of Arkansas. I have acted as agent for thirteen months for the Cairo and Fulton R. R. Company, now the St. Louis, Iron Mountain, and Southern Railway Co. Said agency commenced in February, 1875, and ended in March, 1876. About ⅔ of the one hundred and twenty acres in controversy is laid off into town lots, as shown on the plat of Texarkana, made by the Cairo and Fulton R. R. Company. I am well acquainted with the character of the land on the S. E. quarter of the N. E. quarter, a portion of the land in controversy. I have surveyed one side of it, and have been over the larger portion of it. Three-fourths of the forty acres is overflowed, creek-
159 bottom land. To make it fit for cultivation, it would require ditching and levying. I am familiar with all the lands in controversy, having been nearly all over it surveying. I estimate the land in controversy to be worth, with the improvements, ten thousand dollars. I estimate the pine timber that has been taken off that land for lumber purposes to be worth about twelve hundred dollars. I am acquainted with the forty upon which the defendant, Mr. John B. Nix, lives. The land in controversy joins that. I do not know what portion of Mr. Nix's improvements is on the land in controversy. I made the plat of the land in controversy, marked Exhibit A; but I made it from a survey made by Thomas Orr. I did receive notice from Mr. Nix, while agent of the Cairo and Fulton R. R. Company, not to exercise any control over said land whatever. Said notice was in writing, and served on me by J. A. Robert, sheriff of Miller county. The paper here handed me, marked Exhibit B, I recognize it to be the paper, as copy of which
160 was served on me by said plaintiff.

Cross-examination:

I did not have the field notes by me at the time I made the plat above referred to; it was made from verbal information derived from several persons, and from my own knowledge of the lands.

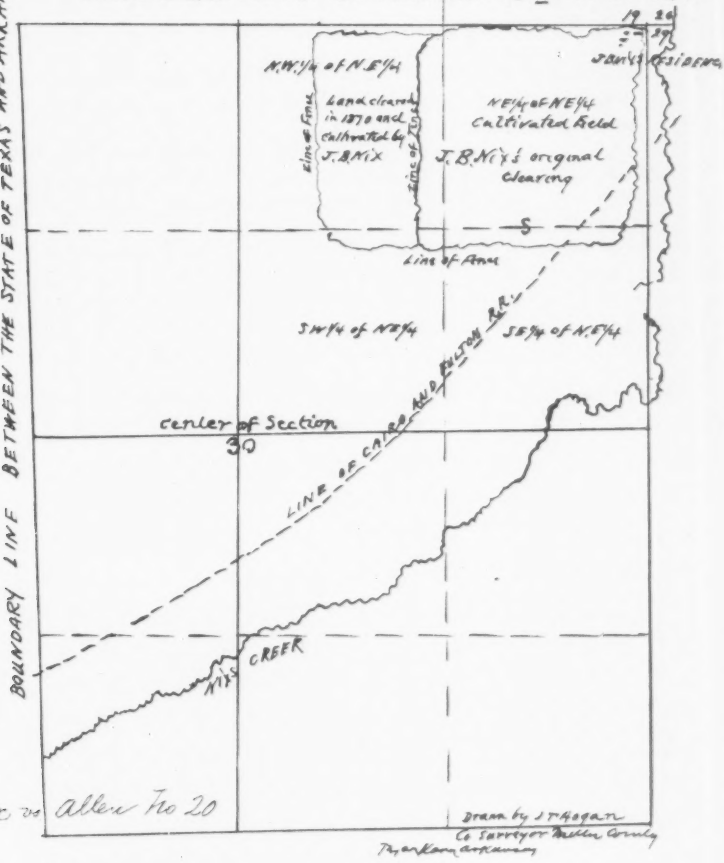
My information came from Dr. W. H. Casey, Thos. Orr, and several other parties.

JAMES T. HOGANE.

Plan of the Original Settlement

of John B. Mix made in the year AD 1847.

Situa Fedon Section 30 TOWNSHIP 15 S. RANGE 28 W.


N.W.¼ of N.E.¼
Land cleared in 1870 and cultivated by J. B. Mix
Line of Fence
Line of Fence
NE¼ of NE¼ Cultivated Field
J. B. Mix's original Clearing
Line of Fence
SW¼ of NW¼
SE¼ of NE¼
center of Section 30
LINE OF CAIRO AND FULTON R.R.
MISS CREEK
Drawn by J. T. Hogan
Co Surveyor Miller County
Pr. Rock Arkansas

BOUNDARY LINE BETWEEN THE STATE OF TEXAS AND ARKANSAS

V

Mix to Allen No 20

163

Deposition of Thos. Orr.

I am acquainted with the plaintiff, Thos. Allen, from character, and the defendant personally.

I am acquainted with the lands upon which John B. Nix lives, and *and* from general reputation he is the owner of the N. E. quarter of the N. E. quarter, section 30. I was at one time surveyor of Lafayette county, Ark. As surveyor, I was called upon by Dr.
161 Casey to survey lands adjoining the land owned by Mr. Nix at one time. I surveyed south-e. of the N. E. at another time. I surveyed S. W. of N. E., and partially surveyed the N. W. of the N. E, all in section 30, township 15, range 28 west, and all joining the land owned by John B. Nix. In making the survey, I found about six acres of John B. Nix's old field on the S. E. quarter, about two acres of this field on the S. W., and about eight acres of the old field on the N. W., all in the N. E. quarter of section 30, township and range as above stated. I am very well acquainted with these lands now in controversy, as I understand, in this suit. I estimate the lands in controversy to be worth seven thousand dollars. I think the pine timber that has been taken off the land in controversy is worth five hundred dollars. I am acquainted with the character of the land on S. E. quarter, a portion of the land in controversy, and I regard $\frac{2}{3}$ of said forty as overflowed swamp land, the greater portion of which is unfit for cultivation without draining and levying.

162 Cross-examination:

At the time I made the survey next to defendant's old field, I did not cause any notice to be served upon him.

THOS. ORR.

[Here follows diagram, marked page 163.]

164 EXHIBIT B TO DEPOSITION OF JOHN B. NIX.

Mr. JAMES T. HOGANE,

Agent at Texarkana, Miller county, Arkansas, for the Cairo and Fulton Railroad Company, now known as the St. Louis, Iron Mountain and Southern Railroad Company.

You are hereby notified not to sell, lease, rent, give permission to persons to settle or build on, or in any other way interfere with the land known as the northeast quarter of section thirty (30), township fifteen (15s), range twenty-eight west (28w), all central of said above described land, being in me and those holding under me, as the lawful owners thereof. You will take due notice thereof and govern yourself accordingly.

May 4, 1875. JOHN B. NIX.

Return of Sheriff.

STATE OF ARKANSAS, *County of Miller:*

165 I do hereby certify that I have duly executed the within notice by delivering to Capt. James T. Hogane, agent for C. & F. R. R. Company, a true copy of the within notice, this May 4, 1875. J. A. ROBERTS, *Sheriff.*

Endorsed: Opened & published by rule of court April 10, 1876. Ralph L. Goodrich, clerk.

Deposition of John B. Nix.

Question 1. State your name, age, & residence?

Ans. 1. My name is John B. Nix; I am in my forty-fourth year; I live in Miller county, Arkansas.

Ques. 2. Are you the plaintiff in this suit?

Ans. 1. I am.

Ques. 3. What is your mother's name?

166 Ans. 3. Sarah Hix; I am her only son and heir.

Ques. 4. When did your mother move to Arkansas?

Ans. 4. In the fall of the year 1846; I came with her.

Ques. 5. On what land did she settle?

Ans. 5. On the northeast quarter of section thirty, township fifteen south, range twenty-eight west.

Ques. 6. Was that settlement made for the purpose of pre-empting that land?

Ans. 6. Yes, sir.

Ques. 7. What improvement was made on that land in 1846?

Ans. 7. A dwelling-house, meat-house, and corn-crib were erected?

Ques. 8. What improvements were made since; say up to the year 1849?

Ans. 8. A change was made, and a portion of each 40-acre subdivision was put in cultivation, (witness here submits a plat showing the land claimed and put in cultivation, which plat and

167 diagram is filed herewith, and made a part of his deposition, and marked Exhibit "A," and says,) This diagram is correct and shows the lands occupied by my mother; the residence and the land claimed and cultivated by her.

(Here follows diagram, marked page 168.)

Ques. 9. How long did your mother continue to occupy and cultivate said land and live thereon as a home?

Ans. 9. Up to the time of her death, in the year 1863.

Ques. 10. Did your mother ever abandon that land at any time before her death?

Ans. 10. She did not; she never had any other home after she settled on that land.

Ques. 11. Did you reside on that land with your mother up to the time of her death?

Ans. 11. I did.

Ques. 12. Where do you now reside, and how long have you resided there.

Ans. I live on the same place now, and have resided there ever since my mother first moved there.

Ques. 13. Where was your mother born?

Ans. 13. In South Carolina.

169 Ques. 14. Was she a citizen of the United States?

Ans. 14. She was, and a citizen of the State of Arkansas at the time of her death.

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Exhibit "A"

Filed May 19. 1880
W. H. Bush
Notary Public

Ques. 15. How old were you when she first settled on the northeast quarter of Sec. 30, Town. 15, R. 28?

Ans. 15. About 11 years old.

Ques. 16. Do you recollect at what time your mother made a declaratory statement and proof required by the United States by a pre-emptor?

Ans. 16. It was in the year 1853. Don't know the precise date, but think it was in the early part of the year.

Ques. 17. At what office?

Ans. 17. Washington, Arkansas.

Ques. 18. Did your mother prove her right of pre-emption to the whole of the northeast quarter of Sec. 30, T. 15, R. 28?

Ans. 18. She did.

Ques. 19. Was your mother a widow and the head of a family at the time she made that settlement?

Ans. 19. She was.

Ques. 20. Was she a woman of limited means?

170 Ans. 20. Yes, sir.

Ques. 21. Did she make any payment at the time she proved up her right of pre-emption?

Ans 21. She did not.

Ques. 22. State all you know about any payments that were at any time made.

[Ans. 22.] Some time in 1854 a payment of fifty dollars was made by my guardian, Benjamin Nix. The money was mine and the proceeds of property left me by my grandfather.

Ques. 23. Was this payment intended as a payment on the whole of the northeast quarter of Sec. 30 aforesaid?

Ans. 23. It was.

(Defendant objects to last question, as leading.)

Ques. 24. For what was the payment of $50 intended?

Ans. 24. It was intended as a payment on the homestead, that is, the whole N. E. quarter of Sec. 30. It was all the money we had.

Ques. 25. For what portion of that land did the register of

171 the land office issue his certificate?

Ans. 25. For the northeast quarter of the northeast quarter, section 30, township 15 south, range 28 west.

Ques. 26. Did your mother, in her lifetime, or have you, since her death, received a patent from the U. S. Government for the northeast quarter of the northeast quarter of section 30, aforesaid?

Ans. 26. No, sir.

Ques. 27. Was your mother ever called upon to do anything more after Benjamin Nix made the payment of the $50 at Washington, Arkansas?

Ans. 27. No, sir. We understood that nothing more could be done until the railroad was completed and the land restored to market, at which time we expected to pay the balance of the purchase-money.

Ques. 28. By what authority was the land to be restored to market?

Ans. 28. By the U. S. Government.

Ques. 29. At the time the fifty dollars was deposited in the land office by Benj. Nix, was the land withdrawn from sale and
172 entry, or not?

Ans. 29. It was.

Ques. 30. Was the northeast quarter of the northeast quarter of Sec. 30 aforesaid a part of the land to which your mother had proved up her right of pre-emption.

Ans. 30. It was.

Ques. 31. Do you know at what time this land was restored to market?

Ans. 31. It was sometime in the year 1878. In the early part of the year, I think.

Ques. 32. After the proclamation restoring said lands, and before the time fixed for the sale, what did you do?

Ans. 32. I went to the U. S. land office and made satisfactory proof of the right of pre-emption, and paid the balance of the money. This was at Camden, Arkansas. I then paid three hundred dollars and received a certificate for the land. (Witness here produces the original certificate and files a copy thereof as part of his deposition, and it is marked Exhibit "B.")

173 Ques. 33. Did you live on this land in 1872?

Ans. 33. I did.

Here follows Exhibit "B," which will be found on page 34.

Ques. 34. Did you offer to purchase this land from the railway company?

Ans. 34. Some time in 1874 or '5 the railway company gave notice to actual settlers by posters, that those persons having a preference right could purchase lands occupied by them within 90 days next after the 16th day of June in that year. I made a tender of $2.50 per acre for the whole quarter section to the railway Co., which offer was refused.

The tender was in legal tender notes of the U. S., and gold, and was made to Jas. M. Loughborough, then land commissioner of the St. Louis, Iron Mountain and Southern Railway Co. This tender was made on the 28th of July, and within the time specified in said notice.

174 Ques. 35. Was this land the N. E. quarter of Sec. 30, pointed out and designated as the land you desired to pay out to Mr. Loughborough, the land commissioner?

Ans. 35. It was.

[Ques. 35½.] What was said by Mr. Loughborough at that time?

Ans. 35½. He said he would not sell the land to me at any price, but would sell it to the first man that came along.

Ques. 36. Was the money counted out to Mr. Loughborough by your agent, Mr. Kirby?

Ans. 36. It was. There was four hundred dollars counted out in Mr. Loughborough's presence, and offered to him.

Ques. 37. Were you and your mother residing on and cultivating said land in 1858?

Ans. 37. We were.

Ques. 38. Were you residing on said land in 1870?

Ans. 38. I was, and ever since, and am now.

Ques. 39. In what county is that land?

175 Ans. 39. In Miller county, Arkansas; was formerly a part of Lafayette Co.

Ques. 40. Where were you and your mother living in 1853?

Ans. 40. On the northeast quarter of Sec. 30, aforementioned.

Cross-examined:

Ques. 1. You state that your mother made a settlement on the N. E. quarter of Sec. 30, in controversy, in the fall of 1846. State what improvements she made that year.

Ans. 1. She built a dwelling-house, meat-house, corn-crib, and stable, as well as I remember.

Ques. 2. Were those improvements put upon the northeast quarter of the northeast quarter of said section 30?

Ans. 2. They were.

Ques. 3. What improvement did she make next, and in what year?

Ans. 3. She had about forty-five acres cleared and put in cultivation in the next year—1847. About ten acres of this may

176 have been cleared in 1848. I don't remember distinctly.

Ques. 4. Has there been any improvement made on the land since? If so, state what.

Ans. 4. Yes, sir; about twenty-five acres have been cleared—eighteen acres in 1869 and seven acres about three years ago. No other improvements, except repairs.

Ques. 5. What part of the quarter section was the forty-five acres first cleared upon?

Ans. 5. The greater part was upon the N. E. ¼ of the N. E. ¼, and the remainder embraced a portion of the other three forties.

Ques. 6. Was all of the N. E. ¼ of the N. E. ¼ of the section improved?

Ans. 6. It was not: about 32 or 33 acres were improved.

Ques. 7. Where was the subsequent improvements located?

Ans. 7. It was made on the east half of the northwest quarter of the northeast of Sec. 30 aforesaid.

Ques. 8. Do you still cultivate all the land that was originally cleared?

177 Ans. 8. I do, except a few acres which *was* worn out.

Ques. 9. You stated that your mother first settled the land for the purpose of pre-empting it. When, and how, did you learn that fact?

Ans. 9. From hearing her say so.

Ques. 10. State at what time you first heard your mother say so?

Ans. 10. I heard her say so in the fall of 1846.

Ques. 11. How old were you at that time?

Ans. 11. About eleven years of age.

Ques. 12. Where was your mother and under what circumstances was that statement made?

Ans. 12. It was in Bowie county, Texas, about three miles from

Texarkana, Ark., at a place where we then resided; she told me that she had selected this place for a homestead.

Ques. 13. Was you present at the time your mother made the declaratory statement at Washington, Arkansas, in the year 1853?

Ans. 13. I was not present; she did not go to Washington,
178 Ark., herself. The papers were fixed up before a justice of the peace and sent to Washington by an agent; I was present when the papers were prepared by the justice of the peace.

Ques. 14. Where did your mother make her proof of pre-emption?

Ans. 14. At Rondo, Arkansas, before Henry Morris, a justice of the peace.

Ques. 15. Did your mother make proof of pre-emption at any other time than that referred to in your last answer?

Ans. 15. If she did I don't remember, except the time the payment of the fifty dollars.

Ques. 16. Did she make further proof of pre-emption at the time the fifty dollars were paid?

Ans. 16. I am not positive, I think she did.

Ques. 17. Were you present at the time the $50 *dollars* were paid?

Ans. 17. I was not.

Ques. 18. You state in your examination-in-chief that your mother made no payment at the time she proved up her
179 right of pre-emption; how do you reconcile that statement with your answer to cross-question 16?

Ans. 18. In 1853 she filed her declaratory statement, and in 1854 she paid the fifty dollars.

Ques. 19. By whom was that fifty dollars paid?

Ans. 19. By Benjamin Nix, my guardian.

Ques. 20. Was you present when it was paid?

Ans. 20. No, sir.

Ques. 21. Do you know anything in regard to the payment except what you have been told by other persons?

Ans. 21. Yes, sir; I do.

Ques. 22. State what particular circumstances in regard to the payment that you know of your own knowledge.

Ans. 22. In the first place there was fifty dollars coming to me from my grandfather's estate in South Carolina, which was received by Benjamin Nix, my guardian, and by him paid on the homestead for my mother.

Ques. 23. Do you know anything else concerning it, of your own knowledge?

180 Ans. 23. I know it was my mother's calculation and desire to pay it all out and never expected to be molested or have any trouble about it.

Ques. 24. Do you know of your own knowledge that Benjamin Nix paid the fifty dollars?

Ans. 24. I suppose he did; he said he did, and brought back a receipt.

Ques. 25. Did your mother, at the time of the payment of the

fifty dollars, apply to enter the northeast quarter of the section, or the northeast forty of that quarter section?

Ans. 25. I don't know that she applied to enter any particular forty, but it was to enter the homestead.

Ques. 26. What do you mean by the homestead?

Ans. 26. Each settler was entitled to enter 160 acres, and that was what she was trying to pay out.

Ques. 27. Do you mean to state your mother did not confine her application to the N. E. ¼ of the N. E. ¼ of section 30 at the time of the payment?

181 Ans. 27. I am certain she did not, from the fact that she could not have made a support on it.

Ques. 28. Has your mother any children living beside yourself?

Ans. 28. I have one sister living.

Ques. 29. Had your mother any other children or descendants living at the time of her death?

Ans. 29. She had two other daughters living at the time of her death, but they have since died, and each have left children, who are now living.

Ques. 30. Had you any other brothers or sisters except those mentioned above?

Ans. 30. I had three other sisters, all dead, two of whom have left children, who are now living.

Ques. 31. What is the name of your sister that is living and the name of her husband, if living, and where do they live?

Ans. 31. Her name is Ann Watson; her husband's name is Roger Watson; they live in Greyson Co., Texas.

Ques. 32. State the name- of your nephews and neices and their parents' names.

182 Ans. 32. Oldest sister's name is Polly White; her children are named Thomas White, Marion White, William White, Louisa White, Franklin White, and John White, and all of these live in Bowie county, Texas, except Louisa White, who lives in Grayson Co., Texas.

Next sister, Sarah Ann, married a man named Nix, left one child, now living, named Caroline D. Russell, and lives in Bowie Co., Texas.

Next sister, Caroline C. Thomas, left one child, named John O. Thomas, now living in Morehouse parish, La.

Next sister, Ellen S. Hurt, left one child, now living, named James J. Hurt, and resides in Bowie Co., Texas.

Ques. 33. Did your sister, or any of them, or their children, live with your mother at the time of her death?

Ans. 33. No, sir.

Ques. 34. Have you ever sold or conveyed or otherwise disposed of any interest in the northeast quarter of section 30? If so, state to whom.

Ans. 34. I sold some to Dr. Beidler and several other parties,
183 viz: Hiram Allen, J. H. Draughon, George A. Beidler, Dr. W. H. Cayce.

Ques. 35. When were the first of those sales made?

Ans. 35. In 1873, to Dr. Covington. In the N. E. ¼ of the N. E. ¼ of Sec. 30. The first sale of any of the land in controversy was made in 1874.

Ques. 36. What interest in this tract of land have you sold or contracted to Dr. Cayce?

Ans. 36. The north half of the southwest quarter of the northeast quarter of said section 30?

Ques. 37. What consideration did he agree to pay you for it?

Ans. 37. I reserved the timber, and sold it to him for fifty dollars.

Ques. 38. What was the value of the one hundred and sixty acres at the time of your mother's death?

Ans. 38. It was worth, and generally valued at, two dollars and a half an acre; with the improvements it was worth more than that. The improvements could not have been put there for less than a thousand dollars.

184 Ques. 39. Was the value about the same in 1870?

Ans. 39. It was.

Ques. 40. What was it worth in 1874?

Ans. 40. It could not have been sold for much more in 1874?

Ques. 41. What is its present value?

Ans. 41. I would not take a hundred dollars an acre for it.

Re-examined-in-chief:

Ques. 1. What is your recollection; did your mother make any proof at the time the fifty dollars were paid?

Ans. 1. I think she did.

Ques. 2. Did your mother ever make you a deed to the land in controversy; and, if so, when?

Ans. 2. She did; in the year 1857, as near as I can recollect.

(Last question objected to, as incompetent.)

Ques. 3. Where is that deed?

Ans. 3. It is lost. It was sent to Little Rock, Ark., to Maj. Gallagher, my attorney. It was recorded in Lafayette county.

185 Ques. 4. What rights were conveyed by that deed?

Ans. 4. All the right, title, and interest of my mother in and to the northeast quarter of section 30, township 15 S., range twenty-eight west.

Re-cross-examined:

Ques. 1. Do you claim the land in controversy under the deed of your mother, to which you have just referred?

Ans. 1. Yes, sir.

Re-direct examination.

Ques. 1. Do you claim it under any other right?

Ans. 1. I claim it under my mother's pre-emption right, and as being an actual settler and occupant of the land.

Ques. 2. Do you claim under the deed to the exclusion of the other children?

Ans. 2. I do.

Re-cross-examined.

Ques. 1. Did your mother obtain a certificate of entry to
186 the northeast qr. of the northeast qr. at the time of the payment of the fifty dollars?

Ans. 1. She obtained a receiver's receipt for the fifty dollars paid for the northeast qr. of the northeast qr. Sec. 30.

Ques. 2. Why did she not then pay for the other three forties?

Ans. 2. Because the land was withdrawn from market.

Ques. 3. Do you mean to state that the N. E. ¼ of the N. E. ¼ of section 30 could then be paid for, and that the other three forties in that quarter could not?

Ans. 3. I did not understand the former question, but it was not paid for, because my mother did not have the money at the time.

Ques. 4. Were your means limited in 1874?

[Ans. 4.] Yes, sir; I was a poor man and am yet.

Ques. 5. Did the money that was tendered by you to J. M. Loughborough belong to you, or did you obtain it from some other
187 person to make the tender?

Ans. 5. I borrowed the money.

Ques. 6. Are you engaged in any business in Texarkana?

Ans. 6. I am running a blacksmith shop.

Ques. 7. How long have you been so engaged?

Ans. 7. About 4 years.

JOHN B. NIX.

Deposition of Benjaman Nix.

Ques. 1. State your name, age, residence and occupation.

Ans. 1. My name is Benjamin Nix; my age is about sixty years; I reside in Bowie county, Texas; am a farmer by occupation.

Ques. 2. Are you any kin to John B. Nix, the plaintiff in this suit; and, if so, what?

Ans. 2. I am his first cousin and also a brother-in-law.

Ques. 3. Were you acquainted with Sarah Nix, the mother
188 of plaintiff; and, if so, how long were you acquainted?

Ans. 3. I knew her as long ago as I can recollect.

Ques. 4. Where did you first know her?

Ans. 4. In South Carolina.

Ques. 5. What year did she move to Arkansas from South Carolina?

Ans. 5. In 1846; we moved here together.

Ques. 6. Where did she settle when she came to Arkansas?

Ans. 6. She settled on a piece of land east of this town, in section 30, township 15 south, range twenty-eight west; she settled on the southeast quarter of the section, according to my understanding. The tract is bounded by the section line on the south and east; it is the land that John B. Nix now lives on that she first settled on.

Ques. 7. Did she change her location after her first settlement?

Ans. 7. She did not; it stands now as first made.

189 Ques. 8. What improvement did she make there in the fall of 1846?

Ans. 8. She built a log cabin or house to live in, and a corn-crib and smoke-house, and such buildings as were necessary for her to get along with.

Ques. 9. What was the age of plaintiff, John B. Nix, at that time?

Ans. 9. He was ten or eleven years old, I think.

Ques. 10. In what year did Sarah Nix die?

Ans. 10. In 1863.

Ques. 11. Did John B. Nix reside with his mother up to the time of her death?

Ans. 11. He did.

Ques. 12. After her death has he continued to reside upon the same place?

Ans. 12. He has, and now resides there. He has had no other home.

Ques. 13. At the time of her death in 1863, how much cleared land was there upon the place?

Ans. 13. There was between thirty and forty acres, if I recollect right.

Ques. 14. For what purpose did Mrs. Nix settle upon that place?

190 Ans. 14. For the purpose of homesteading it.

Ques. 15. Where was Sarah Nix born?

Ans. 15. In South Carolina, I think.

Ques. 16. When did she move to Arkansas?

Ans. 16. She came to Arkansas in the year 1846, and continued to reside there up to the time of her death.

Ques. 17. At the time she moved to Arkansas, was she a widow and the head of a family?

Ans. 17. She was.

Ques. 18. Did she marry a second time?

Ans. 18. She did not.

Ques. 19. Was she a widow of limited means?

Ans. 19. Yes, sir; she had a large family, and came here with but little means.

Ques. 20. Did Sarah Nix, in her lifetime, prove up her right of pre-emption to the land upon which she settled?

Ans. 20. Yes, sir.

Ques. 21. Do you recollect in what year she made that proof?

191 Ans. 21. I do not recollect what year.

Ques. 22. At the time she made the proof did she pay for the land?

Ans. 22. She did not.

Ques. 23. Why did she not pay for the land at that time?

Ans. 23. I don't really know, but think she was not able.

Ques. 23. Did John B. Nix have a guardian; and, if so, who was his guardian?

Ans. 23. He did have a guardian. I was his guardian appointed by the court.

Ques. 24. As such guardian, did any money ever come into your hands; and, if so, from what source, and how much?

Ans. 24. There was money that came into my hands from his grandfather's estate; the amount was fifty dollars.

Ques. 25. What did you do with that money?

Ans. 25. I paid it on his mother's pre-emption.

Ques. 26. What quantity of land did she pre-empt?

192 Ans. 26. One hundred and sixty acres what was allowed, I believe.

Ques. 27. Was that payment intended as part payment upon the whole quarter section, or a full payment upon a particular forty?

Ans. 27. It was a part payment upon the whole quarter section, is my understanding about it.

Ques. 28. Did Mrs. Mix go with you to the land office at Washington, Arkansas, to prove up her pre-emption right at the time you made the payment?

Ans. 28. She did not.

Ques. 29. Do you know whether or not Mrs. Nix went before the clerk of Lafayette Co., Ark., prior to that time and proved up her pre-emption right to the quarter section of land upon which she was living?

Ans. 29. I don't know whether she did or not.

Ques. 30. To whom did you pay that fifty dollars?

Ans. 30. To the receiver of the land office at Washington, Hempstead county, Arks.

193 Ques. 31. What did you receive from the receiver at the time you paid the money?

Ans. 31. His receipt.

Ques. 32. At that time were there any witnesses sworn before the register?

Ans. 32. None that I recollect of.

Ques. 33. Were you present all the time?

Ans. 33. I was.

Ques. 34. If any witnesses had been sworn would you have recollected it?

Ans. 34. I think I would.

Ques. 35. Who was the register at that time?

Ans. 35. Benjamin P. Jett.

Ques. 36. Were you personally acquainted with Benjamin P. Jett?

Ans. 36. I was.

Ques. 37. Was he a man of sober and temperate habits?

Ans. 37. I think not.

Ques. 38. What was his condition when you made the payment of fifty dollars?

Ans. 38. I don't know that he was dissipated at all. He

194 was sober, as far as I know.

Ques. 39. Did you have any trouble in transacting your business with the register at the time? If so, state what it was.

Ans. 39. He required that Mrs. Nix should be present and make proof that she was an actual settler on the land, and she was not able to go to Washington. Then the register required that she should go before a justice of the peace and make affidavit that she was an actual settler and then living on the place.

Ques. 40. Do you know whether that was done or not?

Ans. 40. It was. A justice of the peace went to her house and she made the affidavit.

Ques. 41. Are you positive she did not go to Washington herself at that time and make proof herself?

Ans. 41. I am. She did not go to Washington.

Ques. 42. What time was it that you made this payment to the receiver?

195 Ans. 42. It was in the spring of 1854?

Ques. 43. Do you know whether Sarah Nix in her lifetime made a deed to John B. Nix, conveying to him the land upon which she lived?

Ans. 43. I think she did.

Cross-examined:

Ques. 1. Did you go to Washington twice about Mrs. Nix's land matters?

Ans. 1. I did; I had to come back and get the affidavit and then go again.

Ques. 2. Was it the last time that you obtained the receiver's receipt?

Ans. 2. It was.

(Exhibit "D" to defendant's answer is here shown to witness.)

Ques. 3. Do you recognize Exhibit "D" to defendant's answer as a copy of the original certificate or receipt obtained by you from the receiver at Washington?

Ans. 3. I don't recollect whether it is or not.

Ques. 4. How much land did that receipt call for?

196 Ans. 4. I don't know as I can recollect; I paid fifty dollars, all the money she had, and, at a dollar and a quarter per acre, I supposed I paid for forty acres.

Ques. 5. Whose money was that which you used in making the payment?

Ans. 5. It was John B. Nix's money.

Ques. 6. Did you have any order or authority from court authorizing you to invest his money in that way?

Ans. 6. No.

Ques. 7. Why did you invest his money and take the receipt in his mother's name?

Ans. 7. He had the money on hand, and the pre-emption was in her name, and she wanted to make the payment, is the only reason I know.

Ques. 8. Did you read over the receipt at the time you paid the money?

Ans. 8. I guess I did. It has been a good while ago, and I forget things some times; I most generally read receipts I get for money.

Ques. 9. Was the forty acres described in this receipt the forty that had upon it the houses and the out buildings?

197 Ans. 9. I don't know whether it was or not; don't think it was.

Ques. 10. Were you Mrs. Nix's agent, and so acting at the time of the payment of the money and the taking of the receipt?

Ans. 10. I was guardian for John B. Nix and was acting as agent for her; she [was] old and unable to attend to business herself.

Ques. 11. How long was it between your first and second trips to Washington? State about the time.

Ans. 11. Only a short time; a part of two days, I believe.

Ques. 12. Did you not make haste to return to Washington because the year from the date of Mrs. Nix's filing her declaratory statement had nearly expired?

Ans. 12. I don't recollect; but I think the year was about expired.

Ques. 13. At the time of making said payment, which forty of the quarter section settled upon by Mrs. Nix contained the most of the improvements?

198 Ans. 13. I suppose the northeast forty, as I understand it, had the most improvements.

Ques. 14. At the time of making the payment, how many acres were claimed in Mrs. Nix's improvement?

Ans. 14. I don't recollect; she had a weak force and had to hire most of the work done; she may have had forty or fifty acres cleared.

Ques. 15. Was there as much land then cleared as at the time of her death?

Ans. 15. No, there was not; she had land cleared yearly, along as she could make it; but how much, I don't recollect.

Ques. 16. At what time was the deed from Mrs. Nix made?

Ans. 16. I don't know at what time.

Ques. 17. Were you present when it was made?

Ans. 17. No, sir.

Ques. 18. Do you know how many acres or what interest in land was conveyed by that deed?

Ans. 18. No, sir.

199 Ques. 19. Do you know whether or not Mrs. Nix's improvement did not extend over upon the forty acres just north of the northeast forty above referred; if so, about how many acres?

Ans. 19. I don't know how many acres were improved in that forty, there was a small field there, maybe 8 or 10 acres.

Ques. 20. At the time you made the payment in Washington, which forty acres of the quarter section, upon which Mrs. Nix had filed her declaratory statement, was the most valuable?

Ans. 20. I don't know that there was much difference. The part that had the improvements was the most valuable; the land was about the same.

Re-examined-in-chief:

Ques. 1. Do you know where the north boundary line of the northeast quarter of the northeast quarter of Sec. 30 runs? If so, state where.

200 Ans. 1. I believe I do; it runs right alongs the old Rondo and Boston road in front of the house.

Ques. 2. To whom does that land just north of that belong?

Ans. 2. I don't know exactly; I have understood it belongs to Witherspoon.

Ques. 3. Do you know whether Mrs. Nix had permission from the owner of the tract north of said line to clear land on that tract?

Ans. 3. I don't know.

Ques. 4. Had Mrs. Nix, prior to the time you paid the fifty dollars to the receiver at Washington, filed her declaratory statement to the northeast quarter of said section 30; and, if so, when?

Ans. 4. I think she had, but don't recollect the time, but I believe it was in 1853.

Ques. 5. Are you certain it was not at the time you paid the fifty dollars?

Ans. 5. I am certain it was not, because she was not present then.

BEN. NIX.

201 *Deposition of Joseph Furgerson.*

Ques. 1. What is your name, age, place of residence, and occupation?

Ans. 1. My name is Joseph Ferguson; I am sixty-seven years old; my residence, in Miller county, Arkansas; and a farmer by occupation.

Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am acquainted with John B. Nix, but not with Thomas Allen.

Ques. 3. Were you acquainted with Sarah Nix in her lifetime?

Ans. 3. I was not.

Ques. 4. How long have you known John B. Nix?

Ans. 4. The first time I saw him was in 1846 or '7, and have known him ever since.

Ques. 5. Where did you first get acquainted with John B. Nix?

Ans. 5. It was in 1846 or '7, when his mother first moved to the country, that he came to my house to get some help to raise a house.

202 Ques. 6. Do you know where John B. Nix has resided since that time?

Ans. 6. He has always lived where he now does, and has had no other home that I know of.

Ques. 7. Did you go to the city of Little Rock at any time during the year 1874; and, if so, with whom?

Ans. 7. I went to Little Rock, Ark., in July, 1874, in company with John B. Nix, Joseph Kirby, R. F. Mays, Isom Paulk, and others.

Ques. 8. While there did you go to the office of James M. Loughborough, land commissioner of the St. L., I. M. & S. R'y?

Ans. 8. I did. Mr. Nix, Joseph Kirby and R. F. Mays went with me there.

Ques. 9. While in Mr. Loughborough's office did you see any tender made by Mr. Nix, or by Mr. Kirby for Mr. Nix, to Mr. Loughborough; and, if so, state what you know about it?

Ans. 9. I saw Mr. Kirby make a tender to Mr. Loughborough for

Mr. Nix, but do not know the amount of money nor how
203 much land he wanted to pay for; but I heard Mr. Loughborough refuse to take it.

Ques. 10. Do you know what land it was?

Ans. 10. I do not; but I suppose it was the land upon which he lived. I had heard him say he was going up to Little Rock to pay it out.

Ques. 11. Do you know what Mr. Loughborough said at that time?

Ans. 11. He said so much that I cannot recollect much of it. I inferred from his conversation that he was advising Mr. Nix not to be so hasty, as such a course might debar him from rights and privileges in the future.

Ques. 12. After the tender was made by Mr. Kirby for Mr. Nix, did Mr. Loughborough make any objection as to the character of the tender?

Ans. 12. I cannot give the language he used in refusing the tender, and don't know his reasons for refusing it.

Cross-examined:

204 Ques. 1. Don't you know the number of acres Mr. Nix intended to buy at that time?

Ans. 1. I do not recollect of hearing him say.

Ques. 2. Do you know whether the money tendered was Mr. Nix's money, or money that he had borrowed?

Ans. 2. I don't know.

Ques. 3. Which Mr. Kirby made the tender?

Ans. 3. Joseph F. Kirby.

JOSEPH FURGERSON.

Deposition of Richard F. Mays.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. Richard F. Mays; am seventy years of age; I reside in Miller county, Arkansas; and by occupation farmer and merchant.

Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am acquainted with the plaintiff, John B. Nix, but do not know Mr. Allen, the defendant.

205 Ques. 3. How long have you resided in this vicinity?

Ans. 3. Since the year 1852.

Ques. 4. Were you acquainted with Sarah Nix in her lifetime?

Ans. 4. I was. I made her acquaintance in February, 1853.

Ques. 5. Where was she residing at that time?

Ans. 5. At the place where John B. Nix now lives.

Ques. 6. Did she continue to reside there until her death?

Ans. 6. I think so.

Ques. 7. How long has John B. Nix resided there?

Ans. 7. Ever since I have known him. I never knew of his having any other home.

Ques. 8. How much open land did she have in 1853?

Ans. 8. I don't know how much; there was a little farm cleared up; I did not notice particularly.

Ques. 9. Do you recollect when the railroad company advertised their lands for sale.

Ans. 9. I am not positive, but think it was on the 16th
206 day of June, 1874.

Ques. 10. Did you go to Little Rock that year; if so, with whom?

Ans. 10. I did; went in company with Joseph Fergurson, John B. Nix, and Joseph F. Kirby, and went up there on the 28th day of July, 1874.

Ques. 11. While there were you in the office of James M. Loughborough, land commissioner of the St. Louis, Iron Mountain and Southern Railroad Company; and, if so, who of your party were with you?

Ans. 11. I went to Mr. Loughborough's office with Joseph Fergurson, John B. Nix, and Joseph F. Kirby.

Ques. 12. While there did you see a tender of money made to Mr. Loughborough; and, if so, by whom was it made, and for whom, what amount, and for what purpose?

Ans. 12. I saw Mr. Joseph F. Kirby make a tender of money to Mr. Loughborough for John B. Nix; I think there was four hundred dollars, and I think it was to pay for the land upon which Mr. Nix is residing.

207 Ques. 13. Do you know what kind of money was tendered on that occasion?

Ans. 13. I loaned the money to Mr. Nix, and Mr. Kirby having been employed to attend to the matter for Mr. Nix, he examined the money in my presence and found some bills that he said were not legal-tender notes, which were taken out by him and the right kind of money put in their place.

Ques. 14. Did Mr. Loughborough receive this money?

Ans. 14. No, sir.

Ques. 15. Why did he refuse to receive the money?

Ans. 15. He said the land was not for sale.

Ques. 16. Do you recollect any remarks made by J. M. Loughborough to Mr. Nix at that time?

Ans. 16. Mr. Loughborough said to Mr. Nix, "Do you know what you are doing?" Mr. Nix replied that he did. There was a great deal of conversation between the several parties, and I cannot recollect much of what was said.

208 Ques. 17. Was there a plat of lands lying upon Mr. Loughborough's table at the time?

Ans. 17. I don't know.

Ques. 18. Was the land that Mr. Nix wanted to buy pointed out?

Ans. 18. Not that I know of. They seemed to know what land it was. It was the land that Mr. Nix was living on, and Mr. Loughbourough said it was not for sale.

Ques. 19. What was offered by Mr. Nix?

Ans. 19. Mr. Nix offered two dollars and a half per acre, which was refused by Mr. Loughborough.

Ques. 20. Do you recollect that Mr. Loughborough at that time

told Mr. Nix that his making a tender and offering to buy the land might cut him off from any right to buy the land in the future?

Ans. 20. I do not.

Ques. 21. May not such a remark have been made?

Ans. 21. It may, but I do not recollect it.

209 Cross-examined:

Ques. 1. Did you understand from Mr. Nix that he desired at that time to purchase the particular forty acres upon which his house and out-buildings were situated?

Ans. 1. No, sir.

Q. 2. Why did he not?

Ans. 2. He was claiming more, and there was nothing said about any particular forty acres that I recollect of.

Ques. 3. Do you know whether or not Mr. Nix did not at that time claim to own that forty acres by purchase from the United States Government?

Ans. 3. I do not.

Ques. 4. How many acres of land did he claim the right to purchase at that time?

Ans. 4. I think it was one hundred and sixty.

Ques. 5. Do you know whether or not it was all the same quarter section?

Ans. 5. I do not.

210 Ques. 6. When did Mr. Nix repay you the four hundred dollars.

Ans. 6. The next day he said he had no use for it any more.

Ques. 7. Was it the same money that was tendered that was returned to you?

Ans. 7. I think so.

Ques. 8. Was not this money loaned to Mr. Nix for the purpose alone of making that tender?

Ans. 8. Yes, sir.

Re-examined-in-chief:

Ques. 1. When did you let Mr. Nix have that money?

Ans. 1. On the day we went to Little Rock; Mr. Nix had spoken to me some time before to let him have the money, and on the way up I counted it out to Mr. Kirby, who was acting as Mr. Nix's agent. The amount was $400.

Ques. 2. Was it understood that Mr. Nix should use the money as he saw proper?

Ans. 2. Yes; I was going up on the same kind of business,

211 and it had been reported that the company would not receive the money which we proposed to pay for lands, but if they had offered to receive Mr. Nix's tender it would have been all right.

Recross:

Ques. 1. Was it loaned with the understanding that it should be returned in case the tender was refused?

Ans. 1. It was.

R. F. MAYS.

Deposition of James T. Hogane.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. James T. Hogane; I am 48 years of age; I reside in Texarkana, Ark.; I am by occupation a surveyor and land agent.

Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am.

212 Ques. 3. Are you acquainted with the land in controversy?

Ans. 3. I am.

Ques. 4. Have you ever made a survey of those lands and the improvements thereon?

Ans. 4. Yes, sir; I have surveyed the land and made minutes upon the improvements terminated on the different lines.

Ques. 5. Did the improvements cover portions of each of the legal subdivisions of the quarter-section; the northeast quarter of section 30, town. 15 S., range 28 W.?

Ans. 5. The bulk of the improvement is on the northeast fourth; about one-third of the northwest fourth was covered by an improvement; about 4 or 5 acres was improved on the southeast fourth, and a small portion on the southwest fourth; don't know how much, but it corners in the field.

Ques. 6. How much cleared land was there on the whole section?

Ans. 6. I don't know for certain, but, as near as I can rec-

213 ollect, there was some sixty or seventy acres.

Ques. 7. When did you make that survey?

Ans. 7. I think it was in 1875.

Ques. 8. Have you any date by which you could make a plat of that quarter section?

Ans. 8. I have the original filed notes of the survey.

(Here the witness is requested to make a plat of survey of said tract of land, to be filed as part of his deposition, which is filed and marked Exhibit "A.")

(Here follows map, marked page 213*a*.)

Ques. 9. Did you ever act as agent for the St. Louis, Iron Mountain and Southern Railroad Company; if so, when?

Ans. 9. I did; I was appointed by James M. Loughborough, in February, 1875, and acted as agent up to the first week in March, 1876.

Ques. 10. What was the extent of your authority as such agent?

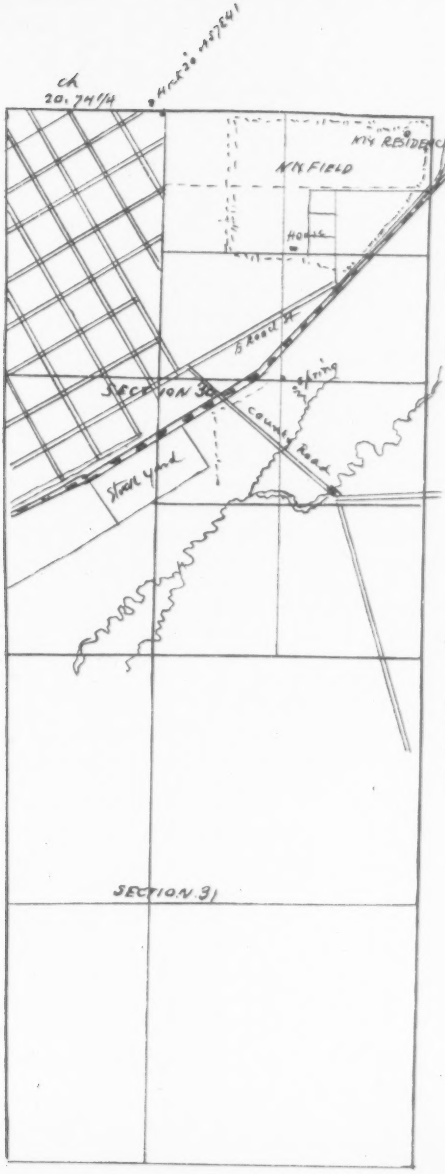
Ans. 10. I was authorized to sell lots and lands, and also to make surveys of the same.

214 Ques. 11. Did you, as agents of the railway Co., survey any of the land in controversy?

Ans. 11. I surveyed some of the lots.

Ques. 12. Did you sell any lots?

Ans. 12. I sold some lots to Stanley McCartney, but the sale was not ratified and the money was returned because the price was too low.



No. 20
N'x
v
Allen
} page 213a

State of Arkansas }
County of Miller }
May 2nd 1888
I certify that the above map is a correct transcript of the Field notes and Survey made by me as County Surveyor during the year 1878 and afterwards
J T Hogans
Surveyor & Land Agent

Exhibit "A"

Hogans
Deposition

213a

Ques. 13. While you were acting as such agent was there a notice served on you by John B. Nix?

Ans. 13. Yes, sir.

Ques. 14. Have you a copy of that notice?

Ans. 14. A copy was left with me, but it was afterwards lost.

Ques. 14. Can you state the purport of said notice; if so, what was it?

Ans. 14. The notice stated that John B. Nix was the owner of the land and forbid the sale of any more lots, and notified me not to build on lots I had selected; I had built a small house on lots bargained for by Mrs. Hogane, in the latter part of April, 1875, and a day or two afterwards I received the notice.

215 Ques. 15. Do you recollect the date of that notice?

Ans. 15. I do not recollect the precise date, but it was about the first of May, 1875.

Ques. 16. On receipt of that notice, did you immediately notify the company?

Ans. 16. I immediately wrote to Mr. Loughborough about it.

Ques. 17. Did you receive an answer to your letter to Mr. Loughborough? If so, state the substance of his reply.

Ans. 17. He wrote me that Mr. Nix's claim did not amount to anything, and instructed me to go ahead and sell anywhere except in Mr. Nix's enclosure. Afterwards he ordered me not to sell any more lots, as the land had been sold to Mr. Allen.

Ques. 18. You have had considerable correspondence with Mr. Loughborough; do you remember the date of the letter received by you in response to your letter, notifying him that Mr. Nix claimed the land?

216 Ans. 18. I do not. I think I have the letter on file.

Ques. 19. How long did it usually take to get an answer to your letters to Mr. Loughborough?

Ans. 19. Usually two or three days; sometimes it would be a week.

Ques. 20. Since you received the letter from Mr. Loughborough, informing you that the railroad had sold this land in controversy to Mr. Allen, do you know of the railroad company having sold lots in that tract?

Ans. 20. I only know from report. I don't know of my own knowledge.

Cross-examined:

Ques. 1. At or about what time was it that you made the survey of which you speak?

Ans. 1. About the latter part of May, 1875.

Ques. 2. Did you have any conversation at or about that time in reference to the land that was claimed by Mr. Nix?

Ans. 2. He told me that the land belonged to him, and
217 he regarded my acts as a taking possession by the company, and he was not going to allow it.

Ques. 3. How much land did he claim, just the 160, or did he claim another forty outside of that quarter section?

Ans. 3. I don't recollect of his claiming any land outside of the northeast quarter of Sec. 30 aforesaid.

Ques. 4. How did he claim to own the northeast quarter of the northeast q'r of Sec. 30?

Ans. 4. He did not make any special claim to that; we had no conversation about that which I recollect.

Ques. 5. Did he not claim also the northeast quarter of the northwest of said section 30?

Ans. 5. I have no recollection that he made any such claim.

Ques. 6. Was your authority to act as agent for the sale of lands for the railroad company in writing?

Ans. 6. Yes, sir; by letter from Mr. Loughborough; also by verbal authority from him through Mr. Burnes.

218 Ques. 7. Are you acquainted with the value of these lands?

Ans. 7. Yes, sir.

Ques. 8. How much is the southwest quarter of the northeast quarter of section 30 aforesaid worth?

Ans. 8. It is worth eight or ten thousand dollars.

Ques. 9. How much is the northwest q'r of the N. E. ¼ of 30 worth?

Ans. 9. Some five or six thousand dollars.

Ques. 10. How much is the southeast quarter of the northeast quarter worth?

Ans. 10. That is not worth so much, because it is swamp land, but I consider it worth about three thousand dollars.

Ques. 11. At the time of making this survey, about how much of the southwest quarter of the northeast quarter of said section was improved?

Ans. 11. As far as I recollect, about 2 or 3 acres.

Ques. 12. Do you recognize the section lines on this map and the half and quarter section lines on this map (which map is

219 here shown witness, and marked Exhibit "B" to his deposition) as being correct?

Ans. 12. Yes, sir. They are platted to a scale, and are correct.

Ques. 13. Is the figure "30" in said plat, in the northeast corner of the northeast quarter of section 30, township 15, south range 28, west, properly located in the northeast corner of said section?

Ans. 13. The smallest figure 30, on that plat is properly located in the northeast corner of the northeast quarter of section thirty, township (15) fifteen, south range twenty-eight (28) west.

JAMES T. HOGANE.

Deposition of Eli H. Moores.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is Eli H. Moores. I am sixty-five years of age. I reside in Bowie county, Texas, about one mile from Texarkana, and by occupation a farmer.

220 Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am acquainted with John B. Nix, but not with Thomas Allen.

Ques. 3. How long have you lived in this vicinity?

Ans. 3. Forty-two years.

Ques. 4. Were you acquainted with Sarah Nix in her lifetime?

Ans. 4. I was. I helped her raise her first house.

Ques. 5. In what year was that?

Ans. 5. In the year 1847 or '8.

Ques. 6. Did she live upon that place up to the time of her death?

Ans. 6. She did.

Ques. 7. Do you recollect in what year she died?

Ans. 7. I do not.

Ques. 8. Did John B. Nix live with his mother from the time she first settled on that place until she died?

Ans. 8. Yes; always.

Ques. 9. Since her death where has he resided?

Ans. 9. Right here, at the same place.

Ques. 10. For what purpose did Mrs. Nix settle upon that place?

221 Ans. 10. She said she intended to pre-empt it.

Ques. 11. Do you know the numbers of the land she settled upon?

Ans. 11. I cannot tell the numbers, but I know the corners. The section line runs right in front of the house.

Ques. 12. Has John B. Nix ever had any other home since he first settled there with his mother, when a boy?

Ans. 12. No, sir; he has not.

Cross-examined:

Ques. 1. Do you know the numbers of the section or the parts of the section upon which she settled?

Ans. 1. No, sir; I do not.

E. H. MOORES.

Deposition of Luke Hickey.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is Luke Hickey; I am about forty-five years of age; I live in Texarkana, Arkansas; and am at present em-

222 ployed by the St. Louis, Iron Mountain and Southern Railway Company.

Ques. 2. Have you ever bought any land from the St. Louis, Iron Mountain and Southern Railway; if so, when?

Ans. 2. I bargained for some from Charles Bramble, the agent of the railroad, I could not say the time, but about three years ago.

Ques. 3. What land did you purchase? Look at the map (which is here shown witness) and point out the lot.

Ans. 3. I purchased lot 16 in block 69 (as designated on Exhibit "B" to James T. Hogane's deposition).

Ques. 4. Did you purchase any other lots?

Ans. 4. I purchased lots 16, 17, 18, in block 67 (as shown on same Exhibit); I purchased them from same party.

Ques. 5. Have you deeds to these lots?

Ans. 5. Yes, sir; I have.

Ques. 6. Who made you a deed to these lots?

[Ans. 6.] The Union Trust Company, I believe.

223 (Witness here exhibited three deeds purporting to be executed by the St. Louis, Iron Mountain and Southern Railway Company to Luke Hickey, and by the Union Trust Company of New York to Luke Hickey, dated August 31st, 1877, for lot 16, block 69; April 14, 1879, for lots 16 and 17, block 67; and October 28, 1879, for lot 18, block 67; all duly acknowledged and recorded in the clerk's office of Miller county, Ark.) Which aforesaid description of said deeds I do hereby certify to be correct.

W. H. BUSH,
Notary Public.

Ques. 7. Do you know whether the lots for which those deeds are given are upon the land claimed by Mr. Nix?

Ans. 7. I don't know. I am told it is in dispute.

LUKE HICKEY.

Deposition of Edwin Bancroft.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. Edwin Bancroft; aged 40 years; residence, Texar-
224 kana, Arkansas; and a lawyer by profession.

Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am.

Ques. 3. Do you know the land in controversy between John B. Nix and Thomas Allen?

Ans. 3. I know the land, but cannot give the numbers of it. I can point it out on the plat.

Ques. 4. Have you ever proposed to purchase any of this land from Mr. Allen; and, if so, when?

Ans. 4. I have. I went to Mr. Allen some time in the latter part of the year 1876, I think since this suit was instituted, and proposed to purchase some of this land. I had moved on to the land in question, and was ordered off by Mr. Nix. Understanding Mr. Allen to be the owner, I made application to him to buy the land, and he told me that he had nothing to do with it, but for me to go to the agent of the railway company, at Little Rock, Ark. I remarked to
him I had seen from the papers that the land belonged
225 to him, and for that reason I had made application to him in person. Mr. Allen said that the railway company had authority to use his name, and any business in reference to that land would have to be done with the railway company's agent, at Little Rock. I have reference to the newspapers, and not the papers in the case.

Cross-examined:

Ques. 1. Who, at that time, was the railway company's agent at Little Rock?

Ans. 1. To the best of my recollection it was Thomas Essex.

Ques. 2. Did Mr. Allen state to you whether or not Thomas Essex was his (Mr. Allen's) agent for the sale of that land?

Ans. 2. Our conversation occurred in front of the Maynard Hotel on the platform, and was short, as Mr. Allen was about to leave on

the train, and I don't know whether he mentioned Mr. Essex' name or not, I don't think he did.

E. BANCROFT.

226 *Deposition of Joseph F. Kirby.*

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. Joseph F. Kirby; am 47 years of age; I reside in Bowie county, Texas; and by occupation a farmer.

Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am.

Ques. 3. State whether or not, in the summer of 1874, you went to Little Rock in company with the plaintiff, John B. Nix.

Ans. 3. I did; at least that is my recollection; it was in 1874; I don't recollect of having been to Little Rock but that one time with him.

Ques. 4. For what purpose did you and he go there at that time?

Ans. 4. For making a tender of payment on some lands that he and I claimed.

Ques. 5. What lands did he claim?

[Ans. 5.] South half of the northeast quarter, northeast of northwest, and northwest of northeast of section 30, township (15) fifteen south, range (28) twenty-eight west.

227 Ques. 6. State whether or not any one was acting as agent or attorney for Mr. Nix at the time in making this tender; and, if so, who was it?

Ans. 6. My recollection is that he acted for himself.

Ques. 7. State whether Mr. Nix made any tender of money at that time; and, if so, to whom, what amount was tendered, and for what purpose was the tender made?

Ans. 7. He did; to Mr. Loughborough. The amount was four hundred dollars, and for the purpose of paying for the land described in answer to question No. 5, above.

Ques. 8. Do you know whether this four hundred dollars was Mr. Nix's money, or whether it was money borrowed for the purpose of making a tender?

Ans. 8. A part of it was money borrowed for the purpose of making the tender.

Ques. 9. State whether there was any other tender made by or for Mr. Nix than the one above referred to?

228 Ans. 9. None that I know of.

Ques. 10. Do you know upon which forty acres of land Mr. Nix was living, and where he had his buildings at that time?

Ans. 10. My understanding was that it was the northeast quarter of the northeast quarter of Sec. 30, aforesaid.

Ques. 11. Why did not Mr. Nix make a tender for this forty at that time?

Ans. 11. I guess he did not want to purchase it.

Ques. 12. Do you know why he did not want to purchase it?

Ans. 12. I think it was because he held a receiver's receipt from the U. S. Land Office for the purchase-money of the northeast quarter of the northeast quarter of said section 30.

Ques. 13. Who, besides Mr. Nix, went with you to Little Rock at that time?

Ans. 13. Mr. Joseph Fergurson and R. F. Mays.

Ques. 14. Who were present at the time the tender referred to was made?

229 Ans. 14. They were all present.

Cross-examined:

Ques. 1. Were you a practicing attorney at that time?

Ans. 1. I was offering to practice.

Ques. 2. Were you Mr. Nix's attorney, and did you advise him?

Ans. 2. I was not his attorney.

Ques. 3. Did not Mr. Nix look up to you for counsel and advice in that matter; and, if so, did you not advise him?

Ans. 3. I am not prepared to answer whether he looked to me for advice; I know I did advise him, as I had a similar case, and my attorneys advised me to make a tender, and so I advised him to do the same.

Ques. 4. Did you only advise him to make the tender?

Ans. 4. I think that is all I advised him to do; that is my recollection at present.

Ques. 5. Was there any other tender made at that time except the tender made by Mr. Nix?

230 Ans. 5. I made a tender.

Ques. 6. Upon what land did you make a tender?

Ans. 6. Upon the north half of southeast quarter, southeast of northwest quarter *quarter*, and southwest of southeast quarter of said section 30.

Ques. 7. Do you know whether there was a plat of the land lying on Mr. Loughborough's table when this tender was made?

Ans. 7. There was a plat in the office I understood; it was not on Mr. Loughborough's table that I know of.

Ques. 8. Where was the tender made?

Ans. 8. In the land department.

Ques. 9. Did Mr. Nix, while in the office, point out and designate the land he wanted to pay for?

Ans. 9. My recollection is he did.

Ques. 10. Did Mr. Loughborough acknowledge Mr. Nix's tender to be a good and legal tender?

Ans. 10. He did.

Ques. 11. You say Mr. Nix had borrowed some of the

231 money; state all you know about the money.

[Ans. 11.] Mr. Mix and I did not have enough money between us to pay out our land, and we borrowed enough to make up the amount, and had full authority to use it in payment of the lands we desired to purchase, and the party we borrowed from looked to us to pay him back.

Re-examined-in-chief:

Ques. 1. State whether or not, in the original case of Thomas

Allen against John B. Nix, you were not called as a witness by said John B. Nix.

Ans. 1. My recollection is that I was.

Ques. 2. What did Mr. Loughborough say or do at the time of making the tender that causes you to assert that Mr. Loughborough admitted the tender to be good and legal?

Ans. 2. He went at my request from his private office into the land office, where I had my witnesses, as I had informed him,
232 in order that I might make a tender of the amount of money required by the statutes in the presence of witnesses, and he stated that he would not receive it; he told me before he left his office that the company was not going to receive the money; I counted the money in his presence, and offered it to him.

Ques. 3. Did he say that it was a good and legal tender?

Ans. 3. He admitted that it met the requirements of the law, and was a legal tender for the land, but he told me he would not receive it.

Ques. 4. Did he receive it?

Ans. 4. He did not.

Ques. 5. Why not?

Ans 5. Because the company was not going to allow us to purchase it.

Ques. 6. Did Mr. Nix ever pay you anything for your services?

Ans. 6. He did not; I never charged him anything.

Re-cross-examined:

233 Ques. 1. Was there a written agreement between you and Mr. Nix for services?

[Ans. 1.] No, there was not.

JOS. F. KIRBY.

Deposition of John B. Nix.

Ques. 1. State whether there was a plat of the land you wanted to pay on in the office of the company at Little Rock, at the time you, Kirby, Fergurson, and Mays were there?

Ans. 1. There was.

Ques. 2. Did you point out to Mr. Loughborough the land you wanted to buy?

Ans. 2. Yes, sir; I showed it to him on the map; showed him where my improvements were and the land I had in cultivation, and made the tender for the whole northeast quarter of section 30.

Ques. 3. Did Mr. Loughborough admit that the tender was legal and sufficient?

234 Ans. 3. He did. Mr. Kirby asked him the question if he would acknowledge it to be a good and legal tender, and he said he admitted the tender to be good and sufficient in law.

Ques. 4. Have you ever set up any claim to the northeast quarter of the northwest quarter of said section 30, township fifteen south, range (28) twenty-eight west?

Ans. 4. No, sir.

Ques. 5. Have you any improvements on that quarter section, or had you at that time?

Ans. 5. I have not, and never did have.

Ques. 6. When were you 21 years of age?

Ans. 6. On the 27th of November, 1857.

Ques. 7. When did you marry?

Ans. 7. On the 9th of November, 1859.

Ques. 8. Have you been the head of a family ever since that time?

Ans. 8. Yes, sir.

Ques. 9. And have you since that time resided on the northeast quarter of section 30, aforesaid, with your family?

235 Ans. 9. I have resided there all the time.

Ques. 10. What improvements have [you] made since you became the head of a family?

Ans. 10. I cleared some 22 or 23 acres of land and put it in cultivation.

Ques. 11. How much did you pay to the receiver at Camden on this land?

Ans. 11. Three hundred dollars.

Ques. 12. Do you hold the receiver's certificate for that now?

Ans. 12. I do.

Ques. 13. Has that money ever been refunded to you, or tendered to you by the U. S.

Ans. 13. No, sir.

Cross-examined:

Ques. 1. Have you ever been notified by either the register or receiver at Camden that you could receive your money back?

Ans. 1. I have not.

Ques. 2. Did not you, or Mr. Kirby for you, make the tender for the three forty-acre tracts in dispute, and also for the northeast

236 quarter of the northwest fractional quarter of section 30, township 15 S., range 28 W.?

Ans. 2. I only made one tender and that was for the whole northeast quarter of Sec. 30, aforesaid.

Ques. 3. Are you positive as to this?

Ans. 3. I think I am.

Ques. 4. Did you testify in your own behalf in the original case of Thomas Allen against John B. Nix?

Ans. 4. Yes, sir; I think I did.

Ques. 5. Was that deposition taken before J. W. Hudgins, Esq., a justice of the peace?

Ans. 5. I believe it was.

Ques. 6. Did you not testify at that time upon your cross-examination that Joseph F. Kirby did not tender the four hundred dollars for the three forties in controversy alone, but for those three and the northeast quarter of the northwest fractional quarter of said section 30?

Ans. 6. If I did, I don't remember it.

237 Ques. 7. Was it untrue if you did so testify?

Ans. 7. It was not true to the best of my recollection.

Ques. 8. Is your recollection better now as to what occured at the time of the tender than it was in April, 1876?

Ans. 8. I don't know whether it is better or worse.

Ques. 9. How long since you have seen the deed executed by your mother to yourself?

Ans. 9. I don't know exactly; it is some five years since I have seen it.

Ques. 10. Did that deed call for forty or hundred and sixty acres of land?

Ans. 10. It was for her interest in the northeast quarter of section 30 aforesaid.

Ques. 11. Did it specify the northeast quarter of the northeast quarter of the northeast quarter of section 30?

Ans. 11. I don't remember, but according to my recollection it was her entire interest in the northeast quarter.

238 Ques. 12. Did you not testify in your examination in chief, in the deposition above referred, that you received a deed from your mother, Sarah Nix, to the northeast quarter of the northeast quarter of said section 30?

Ans. 12. I think not; I never understood it that way.

Ques. 13. Did you not in said suit of Thomas Allen against you, by your own testimony and that of your witnesses, endeavor to prove and recover damages against said Thomas Allen on account of the timber that had been cut from the northeast quarter of the northwest fractional quarter of said section 30?

Ans. 13. No, sir; not that I recollect.

Ques. 14. Did you not testify in your deposition as aforesaid as to how much you had been damaged by reason of the cutting of the timber, either upon the lands in controversy, or said northeast quarter of the northwest fractional quarter of said section 30?

239 Ans. 14. Yes, sir; I think there was something said about the timber being cut off the northeast quarter.

Ques. 15. Was there nothing said about the timber being cut off the northeast quarter of the northwest fractional quarter of section 30?

Ans. 15. I don't remember, as I did not claim the timber or lands either.

Ques. 16. Was not that deposition taken in Texarkana on or about the 6th day of April, 1876.

Ans. 16. I reckon it was; I don't remember exactly.

Re-examination-in-chief:

Ques. 1. If you testified that Mr. Kirby did make a tender referred to in ques. 6 of this cross-examination, are you not certain that it was not true, and that you were mistaken?

Ans. 1. I am certain I was mistaken.

Ques. 2. Did not Mr. Kirby, when he was at Little Rock
240 with you, make a tender for some land for himself adjoining yours?

Ans. 2. He did.

Ques. 3. Did any of the land for which he made a tender lie west of yours?

Ans. 3. I think it did.

Ques. 4. Was your tender and his made about the same time?

Ans. 4. It was; mine was made first and his immediately afterwards.

Ques. 5. Do you recollect whether or not Mr. Kirby made a tender on the northwest fractional quarter of said section or some part thereof?

Ans. 5. I think he did.

Recross-ex.:

Ques. 1. Was it upon the whole of that quarter or a part of it?

Ans. 1. I don't remember.

JOHN B. NIX.

Deposition of Thomas Orr.

Ques. 1. What is your name, age, occupation, and residence?

241 Ans. 1. Thomas Orr; I am 36 years of age, reside in Texarkana, and am a justice of the peace and land agent.

Ques. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am acquainted with John B. Nix, but not with Mr. Allen.

Ques. 3. How long have you known John B. Nix, the plaintiff?

Ans. 3. Since August, 1865.

Ques. 4. Have you ever acted as county surveyor?

Ans. 4. I was county surveyor from 1872 to '74.

Ques. 5. Have you ever surveyed the land in controversy?

Ans. 5. I have surveyed part of it, the south half of the northeast quarter of section 30, and subdivided it, and also the west line of the northeast quarter.

Ques. 6. At whose instance did you make the survey?

Ans. 6. At Mr. Nix, and by request of Mr. Cayce.

Ques. 7. When was the survey made?

Ans. 7. It was made late in the year 1873.

242 Ques. 8. Were you at that time requested to survey the northeast quarter of the northwest quarter of section 30?

Ans. 8. I was not.

Ques. 9. Were there any improvements at that time upon the northeast quarter of the northwest quarter?

Ans. 9. There was not.

Ques. 10. Did Mr. Nix set up any claim to that forty?

Ans. 10. I never heard of any.

Cross-examination:

Ques. 1. Are you acquainted with the value of these lands?

Ans. 1. I think I have some idea of their value.

Ques. 2. How much is the S. W. ¼ of the N. E. ¼ worth?

Ans. 2. About twenty-five thousand dollars.

Ques. 3. How much is the N. W. ¼ of the N. E. ¼ worth?

Ans. 3. Ten thousand dollars.

Ques. 4. How much is the S. E. ¼ of the N. E. ¼ worth?

Ans. 4. Eight thousand dollars.

243 Ques. 5. Was the survey made by you as county surveyor?

Ans. 5. I was county surveyor at the time, but the survey was as an individual survey, and was not recorded as official.

Ques. 6. Did you notify parties who owned adjacent lands?

Ans. 6. I did not.

Re-direct:

Ques. 1. Were any persons present who owned adjacent lands when you made that survey?

Ans. 1. There were persons present who claimed adjacent lands, Mr. Kirby, Mr. Furgerson, and Mr. Melton, and others whose names I do not know, were present.

THOS. ORR.

Deposition of James F. Smith.

Ques. 1. What is your name, age, residence, and occupation?

244 Ans. 1. My name is James F. Smith; aged 35 years; my residence is Texarkana, Arkansas, and am in the drug business at present.

Ques. 2. How long have you resided in Texarkana?

Ans. 2. I have resided in Texarkana, Texas, and Texarkana, Arkansas, about 6 years.

Ques. 3. Are you acquainted with John B. Nix, the plaintiff in this action; and, if so, how long have you known him?

Ans. 3. Five or six years.

Ques. 4. Are you acquainted with his general reputation for truth and integrity in the community in which he lives?

Ans. 4. I am.

Is that reputation good or bad?

Ans. 4. It is good; I have always regarded him as a truthful and reliable man, and that is the reputation he sustains in this community.

Ques. 5. From that reputation, would you believe him under oath?

Ans. 5. I would in any civil case, even where he was interested.

245 Ques. 6. Is he regarded in this community as a truthful man, of strict integrity?

Ans. 6. I regard him as a reliable and truthful men.

J. F. SMITH.

Deposition of William Behan.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is William Behan; my age is 37 years; I reside in Texarkana, Texas, and by occupation a merchant.

Ques. 2. How long have you resided in Texarkana?

Ans. 2. About six years.

Ques. 3. Are you acquainted with John B. Nix, the plaintiff, in this action, and if so, how long have you known him?

Ans. 3. I am; have known him five or six years.

Ques. 4. Are you acquainted with his general reputation in this community for truth and integrity?

246 Ans. 4. I am; I think I am, at least.

Ques. 5. Is that reputation good or bad?

Ans. 5. It is good.

Ques. 6. From that reputation would you believe him on oath?

Ans. 6. I would.

Ques. 7. Is he regarded as a truthful and upright man in the community?

Ans. 7. I regarded him as a such, and think he is so regarded in the community.

Cross-examined:

Ques. 1. Are you acquainted with Joseph F. Kirby and his general reputation in this community for truth and morality?

Ans. 1. Yes, sir; I am.

Ques. 2. State what that reputation is?

Ans. 2. It is good.

Ques. 3. How long have you been acquainted with Mr. Kirby?

Ans. 3. About seven years.

W. BEHAN.

247 *Deposition of James H. Draughon.*

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. James H. Draughon; I am 37 years old; I reside in Texarkana, Arkansas, and a merchant by occupation.

Ques. 2. Do you know John B. Nix, the plaintiff in this action?

Ans. 2. I do, and have known him about six years.

Ques. 3. Are you acquainted with his general reputation for truth and integrity in this community?

Ans. 3. I am.

Ques. 4. Is that reputation good or bad?

Ans. 4. It is good.

Ques. 5. From that reputation, would you believe him under oath in a case in which he was interested?

Ans. 5. Yes, sir.

Cross-examined:

Ques. 1. Are you acquainted with Joseph F. Kirby, and if so, for how long have you known him?

248 Ans. 1. I am; have known him six years.

Ques. 2. Are you acquainted with his general reputation for truth and morality through this community?

Ans. 2. I am.

Ques. 3. State what that reputation is?

Ans. 3. It is good—first class, I would say.

J. H. DRAUGHON.

Deposition of W. H. Hakes.

Ques. 1. What is your name, age, residence, and occupation?

Ans. 1. William H. Hakes; am 39 years of age; I reside in Texarkana, Texas, and engaged in banking business.

Ques. 2. Are you acquainted with John B. Nix, and if so, how long have you known him?

Ans. 2. I am; have known him about seven years.

Ques. 3. Do you know his general reputation for truth and
249 integrity in this community?

Ans. 3. I do. It is good.

Ques. 4. From that reputation would you believe him on oath in a case wherein he was interested?

Ans. 4. I would.

Cross-examination:

Ques. 1. Are you acquainted with Joseph F. Kirby, and if so, how long have you known him?

Ans. 1. I am; have known him about seven years.

Ques. 2. Are you acquainted with his general reputation for truth and morality in this community?

Ans. 2. I am.

Ques. 3. State what that reputation is.

Ans. 3. It is good.

W. H. HAKES.

Deposition of Martin V. Flippin.

Ques. 1. What is your name, age, residence and occupation?
250 Ans. 1. My name is M. V. Flippin; my age is 39 years; I reside in Texarkana, Texas; am a merchant.

Ques. 2. Do you know John B. Nix, the plaintiff, and if so, how long have you known him?

Ans. 2. I do; have known him seven years.

Ques. 3. Are you acquainted with his general reputation for truth and integrity in this community?

Ans. 3. Well, yes.

Ques. 4. State what this reputation is.

Ans. 4. It is good as far as I know.

Ques. 5. From that reputation would you believe him under oath in a case in which he was interested?

Ans. 5. Yes, sir.

Cross-examined:

Ques. 1. Are you acquainted with Joseph F. Kirby, and if so, how long have you known him?

Ans. 1. I am; have known him six years and half.

251 Ques. 2. Are you acquainted with his general reputation in this community for truth and morality?

Ans. 2. Yes, sir.

Ques. 3. State what that reputation is.

Ans. 3. Good.

Ques. 4. Is it equally as good as that of John B. Nix?
Ans. 4. Yes, sir.

M. V. FLIPPIN.

Here follows Exhibit B to deposition of James T. Hogane.

(Here follows map, marked page 252.)

253 The following case, with pleadings and record of Thomas Allen against John B. Nix, at law, was used as an exhibit:

Came into the office of the clerk of the circuit court for eastern district of Arkansas Thomas Allen, by U. M. Rose, his attorney, and filed therein his suit in ejectment against John B. Nix, which is as follows:

THOMAS ALLEN *vs.* JOHN B. NIX.

The said plaintiff, who is a citizen of the State of Missouri, brings this suit against said defendant, who is a citizen of the State of Arkansas, and says: That under a certain act of Congress entitled "An act granting the right of way and making a grant of land to the State of Arkansas and Missouri, to aid in the construction of railroad from a point on the Mississippi opposite the mouth of
254 the Ohio river *via* Little Rock to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river," approved February 9, 1853, a grant was made to the State of Arkansas of the right of way for the construction of a railroad from a point on the Mississippi river opposite the mouth of the Ohio, in the State of Missouri, *via* Little Rock to the Texas boundary, near Fulton, in Arkansas, and granted to the State of Arkansas, for the purpose of aiding in making said railroad, every alternate section of the public land of the United States, designated by even numbers, for six sections in width on each side of said road and branches, and that among the lands thus granted was the following: The west half of the northeast quarter, and the southeast quarter of the northeast quarter of section (30) thirty, in township fifteen (15) south, of range twenty-eight (28) west, containing
255 one hundred and twenty acres, more or less. A copy of the list containing said land and approved by the Secretary of the Interior is annexed, marked No. 2.

That afterwards, by an act of the General Assembly of the State of Arkansas, entitled "An act to incorporate the Cairo and Fulton Railroad Company," approved January 12, 1853, the State of Arkansas incorporated said Cairo and Fulton Railroad Company, and granted said land to said company to aid it in the construction of said railroad by a public act approved the 26th of November, 1856, to which reference is here made.

That on the 4th day of May, 1874, the said railroad company was consolidated, according to the laws of said State, with the Cairo, Arkansas and Texas and the St. Louis and Iron Mountain Railroad Company, under the name of the St. Louis, Iron Mountain and

Southern Railroad Company. A copy of the articles of association is hereto annexed, marked Exhibit No. 1.

256 That on the 6th day of May, 1874, the said last-named railroad company duly executed its power of attorney to James M. Loughborough, thereby authorizing him to make and execute deeds of conveyance of all lands of said company by it sold, as will be seen by a copy thereof hereto annexed, marked Exhibit A, and made part hereof.

That the said plaintiff having purchased said lands of said last-named railroad company, the said company, by its deed of conveyance dated on the 14th day of May, 1875, executed by said Loughborough, as agent and attorney-in-fact, as aforesaid, conveyed said land to said plaintiff in fee-simple forever, a copy of which deed is hereto annexed, marked Exhibit B, and made part hereof.

And the plaintiff says that he is the owner of the title to said land, and is entitled to the immediate possession thereof; but that the said defendant unlawfully withholds possession thereof from him, to his damage one thousand dollars.

257 Wherefore he prays judgment for the said land for said damages and costs of suit, and for all other proper relief.

U. M. ROSE,
For Pl'ff.

I undertake for costs, as usual, in this case.
Oct. 9, 1875.

U. M. ROSE.

EXHIBIT B.

This deed, made and entered into this fourteenth day of May, in the year 1875, by and between the St. Louis, Iron Mountain and Southern Railway Company, a corporation organized and existing under the laws of the State of Missouri and Arkansas, it being formed by the consolidation of the St. Louis and Iron Mountain Railroad Company, of Missouri, with the Cairo and Fulton Railroad Company, of Arkansas, by James M. Loughborough, its attor-

258 ney-in-fact, party of the first part, and Thomas Allen, of the city of St. Louis, State of Missouri, party of the second part, witnesseth:

That said party of the first part, for and in consideration of twelve hundred ($1,200) dollars to it paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, unto the said party of the second part, and unto his heirs and assigns, the following-described real estate, situate, lying, and being within the county of Miller, State of Arkansas, to wit: The west half of the northeast quarter, and the southeast quarter of the northeast quarter of section thirty (30), in township fifteen (15) south, of range twenty-eight (28) west, containing an area of one hundred and twenty (120) acres, more or less.

To have and to hold the same, with all the rights, privi-

259 leges, appurtenances, and immunities thereunto belonging or in anywise appertaining, unto the said party of the second part, and to his heirs and assigns, forever.

Comes the defendant, by Gallagher and Newton, Esqs., his attorneys, and files herein his answer.

Which answer is as follows:

For answer to said complaint defendant says that he—

Denies that the said grant of lands by Congress to the State of Arkansas, in aid of the construction of the Cairo and Fulton
266 Railroad, was every alternate section of the public lands of the United States, designated by even numbers, for six sections in width on each side of said line of road and branches. Some alternate even-numbered sections were excepted from the said grant, as will be hereafter shown.

Denies that among the lands thus granted were the tracts specially described in the said complaint.

Denies that the State of Arkansas granted said specially described tracts of the N. E. ¼ of said Sec. 30 to the Cairo and Fulton Railroad Company to aid it in the construction of its said road.

Denies that the said Cairo and Fulton Railroad Company, on the 4th day of May, 1874, or at any other time, was consolidated, according to the laws of Arkansas, with the Cairo, Arkansas and Texas and the St. Louis and Iron Mountain Railroad Companies under the name of the St. Louis, Iron Mountain and Southern Railway Company, or that the said Cairo and Fulton Railroad Company did or could, under the laws of the State of Arkansas, consolidate
267 with any other railroad company outside the State, except only to the extent of making joint stock and uniting the ends of their respective roads and forming one board of directors for the running management of such united roads.

Denies that said plaintiff purchased the lands mentioned in said complaint of the St. Louis, Iron Mountain and Southern Railway Company, or that said company by its deed of 14th May, 1875, conveyed said lands to said plaintiff, in fee-simple forever, or otherwise, or that said company could or did by said power of attorney, (Exhibit A), authorize or empower said Loughborough, as its agent and attorney, to sell or convey any of the lands granted by the acts of Congress and by the acts of the General Assembly of the State of Arkansas to the said Cairo and Fulton Railroad Company, unless such lands so attempted to be conveyed by said St. L., I. M. & S. Railway Company should have been lawfully and duly conveyed first by said C. & F. Railroad Co. to said St. L., I. M. & S. Railway Company.

Denies that said plaintiff ever was the owner of the title
268 to the lands in said complaint mentioned, or entitled to the possession of any or either of them, or that the defendant unlawfully withholds the possession thereof from said plaintiff; but, on the contrary, this defendant avers the truth to be that he himself is alone entitled to the right of the possession and ownership of said lands, of which he for many years has been and is now in the quiet and peacable occupancy, and holding and claiming the same as owner thereof against all persons. That in 1846 the said N. E. ¼ of Sec. 30 being then public land of the United States, and subject

to settlement under the pre-emption laws, Sarah Nix, the mother of this defendant, with this defendant, who is her son, and who was then a minor, settled upon and took possession of said N. E. ¼ section, as they lawfully might and could do according to the laws of the U. S., and upon the N. E. ¼ of the said N. E. ¼ of section 30 built a house and established for themselves a home, extending their clearing and improvement out from the said N. E. of
269 the N. E. ¼ into and upon all the other three forty-acre tracts, which, with the one upon which they built their house, make up the entire N. E. ¼ of said Sec. 30, and to which entire N. E. ¼ their claim and right of pre-emption was attached, and which said entire N. E ¼ of said section 30 they then, and ever since, continuously, as hereinafter stated, have held, claimed, occupied, and peaceably possessed as and for their own, and which is now continued to be so held, claimed, and occupied, and possessed by this defendant against all persons whomsoever.

That about the year 1854, the defendant having received a small legacy, his guardian expended it by entering at the U. S land office the N. E. ¼ of said N. E. ¼, Sec. 30, being that portion of the said quarter upon which their house was situated, leaving the other three forty-acre tracts still subject to their claim as settlers thereof, because the amount of the legacy was not sufficient to enable them then to pay for any more of said quarter section.

270 The entry was made by the guardian of this defendant, in the name of Sarah Nix, the mother of this defendant, and as this defendant supposes, because of the minority of this defendant, and to facilitate and simplify the transaction of the entry in the land office; but the money paid was the money of this defendant, as aboye stated.

In 1858 my mother conveyed the said tract to me by deed.

In 1863 my mother died; she had lived continuously from the time of her settlement on said quarter section in 1846; from the time of said settlement I have never lived anywhere else, and I am now living there, where I have lived continuously on said north-east quarter section, claiming, holding, and peacably possessing either with my mother, or since her said conveyance and her death, by myself, the whole of said quarter section against all persons, for a period now of thirty years.

And defendant for further answer and defence to said
271 complaint, says: That said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says: That he, this defendant, has been in the quiet and peacable possession of the lands in said complaint mentioned, holding, possessing, and claiming the same as the owner thereof, under a pre-emption right thereto, under the laws of the United States, and under the laws of the State of Arkansas, adversely to all persons, for more than seven years next before the commencement of this suit; and that neither the said plaintiff, his grantor, or predecessor commenced any action against this defendant for the recovery of said lands within seven years next after their pretended title thereto accrued, as averred in said complaint.

And for a further answer and defence, defendant says:

That said plaintiff, as to the S. E. ¼ of said N. E. ¼ of said Sec. 30, ought not to have and maintain his aforesaid action thereof against him, because he says: That on the 28th day of September,
272 1850, Congress granted to the State of Arkansas all and every of the tracts of public land within her borders which then was swamp and overflowed land. That on that date the S. E. ¼ of said N. E. ¼ of 30 was public land of the United States, and was then, in fact, and is now, swamp and overflowed, within the true intent and meaning of said grant. That by said grant said portion of said northeast ¼, viz: The S. E. ¼, 40 acres, became and is the property of the State of Arkansas, with title thereto in fee; and the said State of Arkansas is now the owner of said tract by virtue of said grant, and of the prior legal title thereto, and has continued to be such owner thereof ever since the date of said grant, the 28th of September, 1850.

And for further answer and defence, defendant says: That prior to the passage of the act of Congress of September 28th, 1850, he had an improvement on the S. E. ¼ of said N. E. ¼ of Sec. 30, and
273 was a settler thereon by virtue of his settlement on and claim to the whole of said northeast quarter section of 30, of which the said S. E. ¼ of N. E. ¼ is a part. That said S. E. ¼ of said N. E. ¼ is, and was at the date of the passage of the said act of September 28, 1850, swamp and overflowed land, and as such by virtue of said act, the said tract then became and was the property of the State of Arkansas, and subject to be disposed of by said State, under the laws of said State touching the swamp and overflowed lands. And this defendant avers that by virtue of his said improvement on the said S. E. ¼ of the N. E. ¼ of 30, he, this defendant, became and is entitled to a preference right of purchase thereof, and will so continue to have such right so long as such his settlement and improvement shall continue, and until the said land shall be by the State of Arkansas offered for public sale, which has not yet been done.

That the right and claim of this defendant to said S. E. ¼
274 of said N. E. ¼ of Sec. 30, as well also as the right and titled of the State to said tract as a portion of the swamp and overflowed lands granted by the United States to the State of Arkansas, by the act of September 28, 1850, was specially and particularly excepted by the 8th section of the act of Arkansas of 26th November, 1856, making a transfer of the railroad grant of lands to said company, whereby it is expressly made a condition of said grant to said company, that the act of Arkansas in making that grant and transfer to said company should not be so construed *is* to impair or effect in any way the rights of the State or of individuals under the act of Congress of 28th September, 1850, granting to the State the swamp and overflowed lands.

And for a further answer and defense, defendant says:

That by the act of Congress of February 9, 1853, it was provided, that any and all lands reserved to the United States by an act

275 of Congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever, be and the same were reserved to the United States from the operation of the act of Feb'y 9, 1853, except, &c.

And defendant avers the fact to be, that on the 28th September, 1850, the S. E. ¼ of said N. E. ¼ was in fact swamp and overflowed land of the U. S., and so continued to be and was, on the 9th day of Feb'y, 1853, in fact such swamp land, reserved in effect to the United States by said act of 28th Sep., 1850, for the purpose of aiding in the internal improvement of the State Arkansas, and to enable said State to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein; and said tract was not within the operation of said act of Congress of Feb'y 9th, 1853, and was not granted thereby.

And for further answer and defense, defendant says:

276 That the said "consolodation" in said complaint mentioned did not convey from the said Cairo and Fulton Railroad Co. to the St. L., I. M. and S. Railway Co. the lands mentioned in said complaint, nor did or could said C. and F. R. Road Co. lawfully by such "consolidation" transfer and convey to said St. L., I. M. & S. Railway Co. any of the lands enuring to said C. and F. R. R. Co. by virtue of the acts of Congress and of the State of Arkansas in that behalf, "to aid in the construction of a railroad from a point on the Mississippi river opposite the mouth of the Ohio, in the State of Missouri, *via* Little Rock, to the Texas boundary, &c.;" nor had said Cairo and Fulton R. Road Co. any power or authority under said acts, by such "consolidation," or even by a conveyance, to dispose of any of said lands so conditionally granted, unless the proceeds were to be realized wholly and solely for the benefit and in aid of the construction of the Cairo and Fulton railroad, within the State of Arkansas. That any consolidation or other con-

277 trivance or device, the object and result of which is to transfer the lands granted in aid of the construction of the Cairo and Fulton railroad through Arkansas to any object or to pass them, or any of the proceeds of any of them, away, to aid in building railroads in Missouri, or as security for bonds issued by any other company or for any other object than to aid in the construction of the Cairo and Fulton railroad in this State, is diverting, unlawfully, the said grant or the proceeds thereof to other and different objects than those for which said grant was made, is contrary to the true intent and express conditions of the acts of Congress and of the State making and transferring said land grant to said Cairo and Fulton Railroad Co., is disastrously detrimental to the interests of the people of Arkansas, and a misuser of said grant and the proceeds thereof by said Cairo and Fulton Railroad Company, who are pledged to the strict fulfilment of the provisions and

278 conditions of those acts making said grant, that the lands so transferred to said company and the proceeds thereof shall be wholly and faithfully applied in aid of the construction of a rail-

road within the State of Arkansas, and not to any road in any other State, nor to any other object whatsoever.

And for further answer and defence, defendant says:

That the said St. Louis, Iron M. and S. Railway Co., by its pretended deed of conveyance in said complaint mentioned, conveyed no right, title, interest, or claim in or to the lands mentioned in said complaint to the said plaintiff; for this defendant avers the fact to be that the said St. L., I. M. and S. Railway Co. never received any conveyance of said lands from the Cairo and Fulton Railroad Co. That at the time of the making of the pretended conveyance thereof to the said plaintiff, there was not, and is not now, any such corporation as the "St. Louis, Iron Mountain and Southern Rail-
279 way Company;" that the said "consolidation" was, under the law, a mere union of stocks and of the running management of such separate roads, and not a merger of the name, powers, duties, and property of the Cairo and Fulton Railroad Co., and that said C. and F. R. R. Co. did not thereby cease to exist, but that by its original and only name known to the laws of Arkansas, it still exists, and owns and holds the lands granted to it for the purpose, and only for the purpose, of applying the proceeds of the same to aid in the construction of the said Cairo and Fulton railroad in the State of Arkansas, and that such contract of "consolidation" never has been recorded, so as to become a part of the charter of said Cairo and Fulton R. R. Co., and even if it had been recorded, it would have had not the effect as claimed for this "consolidation."

That said plaintiff never made any contract or agreement for the purchase of said lands in said complaint mentioned with the Cairo and Fulton R. R. Co., and never paid the said consideration
280 in said deed mentioned ($1,200.00), or any other sum therefor, to the Cairo and Fulton Railroad Company. That the whole transaction was a shallow pretence and trick, whereby strangers, acting under the pretence of rights derived from the Cairo and Fulton Railroad Company (a corporation that had been so munificently endowed by the State of Arkansas), might be enabled to deprive one of the pioneers and citizens of this State of his rights as a settler to the improvements which constitute a portion of his *home!*

And for further answer and defence, defendant says:

That by the act of Arkansas, Jan'y 16th, 1855, it was provided in substance that any citizens or heads of families, being settlers or occupants previous thereto on any of the lands granted in aid of said C. and F. R. R., shall be entitled to a preference right of entry of any 160 acres as would include the residence of said settler, which preference right should be at $2.50 per acre, and should con-
281 tinue from said 5th day of January, 1855, and for three months after notice should be given for three successive weeks in a newspaper published in the city of Little Rock that the said land is in the market. And defendant avers the truth to be that as such citizen, head of a family, and settler thereon, as has been hereinabove stated, he is entitled to the preference right to purchase said three forty-acre tracts of land of said company at the said price, but

that no advertisement of said lands being in market has been published as yet in a Little Rock newspaper, as required by said act. That on or about May, 1874, a poster was printed by said company and sent down and posted at or near Texarkana, stating that the lands of the C. & F. R. R. Co., between Little Rock and the Texas boundary, would be for sale at the office of the company, in Little Rock, on and after June 16th, 1874, and on which said poster actual settlers who had not made application to purchase are requested to do so before the day of sale. And it was also therein
282 stated that the lands through which the line of road runs are reserved from sale at present. A copy of which said printed poster is hereto annexed and made part of this answer, marked Exhibit No. 1.

That, notwithstanding the lands had not been put in market by advertising according to said act, and notwithstanding the line of this road runs through the lands settled upon and occupied by this defendant, he concluded, for the sake of peace, to go to Little Rock and pay to the company $2.50 per acre for said lands, and obtain from the said company a deed of conveyance therefor; and so he proceeded to Little Rock, with others, among whom was his agent in that behalf, Mr. J. F. Kirby, and there, at the office of the company, sometime in the summer of 1874, (the precise date not now recollected,) the purchase money at $2.50 per acre for said tracts of land was tendered to J. M. Loughborough, the land agent of
283 the company, by this defendant, through his said agent, Kirby, and which was then and there refused by said Loughborough, for the reason, as this defendant supposes, that said land, as appears by said deed with said complaint exhibited, long before the said 16th day of June, 1874, had been sold and conveyed to said Allen for his own advantage and profit, he then being, and since still continuing to be, president of the company, which claims to hold and dispose of the lands of this grant under the trusts imposed by the law, and in the interest of the Cairo and Fulton Railroad Company; and which sale of said lands to said president is a fraud upon the people of this State; a fraud upon the C. and F. R. R. Co., and upon this defendant; and being committed by said Allen while holding the position of high trust for the State, the C. and F. R. R. Co., and the settlers, the said deed of conveyance is void and conveys to said plaintiff no rights whatsoever in or to the said lands.

And for a further answer and defence, defendant says:

284 That the State of Arkansas, by an act of Nov. 26, 1856, transferred the grant of lands to the Cairo and Fulton Railroad Co., and in said act it was specially provided that the said transfer by the State should be subject to all the conditions, limitations, and restrictions contained in the acts of Congress of February 9th, 1853, and of March 27th, 1854, entitled An act for the relief of settlers on lands reserved for railroad purposes; and which said act of March 27th, 1854, provided, in substance, that every settler on the public lands which have been or which may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption

at the ordinary minimum to the lands settled on and cultivated by them, provided they shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day fixed by the
285 President's proclamation for the restoring of said lands to market. That among the lands of the said grant which reverted to the United States on the 9th day of February, 1863, were the lands in said complaint mentioned. That by the act of Congress of July 28th, 1866, reviving said act of Congress of Feb'y 9th, 1853 and restoring said grant to said company, all the lands mentioned in said act of July 28, 1866, were withdrawn from market (Sec. 3) on that date, an- on account of said proposed railroad.

And defendant avers the fact to be that, prior to the said 27th day of March, 1854, he was, ever since has continued to be, and now is, a settler on the lands mentioned in said complain: fully within the letter and spirit of the said act, as has been in other paragraphs of this answer particularly set forth, and is now for brevity here referred to; and that he is entitled to pre-emption to said tracts, and to prove up and pay for the same whenever the Secretary of
286 the Interior shall issue his rules and regulations in that behalf, and the President of the United States shall, by proclamation, fix the day when the said lands shall be restored to market, which have not yet been done, if the law shall so require it, and his right to the land has not already vested in this defendant, as before stated.

And for a further answer and defence, defendant says:

That by the act of Arkansas of 26th Nov., 1856, transferring the lands of said grant to the Cairo and Fulton Railroad Co., it was provided that every person who, on the 9th of Feb'y., 1853, occupied, by residence and cultivation thereon, any tract of said grant, may purchase from said company such tract, not to exceed 160 acres, at $2.50 per acre. And such claimant was required to file in the State auditor's office, certain affidavits in proof of his claim within three months after said lands were selected and confirmed to said
287 company, and a list or plat thereof filed in the recorder's office of the county in which said lands may lie. And further, that said claimant should, after three months, or as soon thereafter as said company should be in condition to make title, pay to said Co. said $2.50 per acre, and thereby be entitled to a deed for the same; but in case of failure to file proof, or to pay within the times specified, his right to make such purchase should cease.

And defendant avers the fact to be, that prior to, and on the 9th day of February, 1853, he occupied, by residence and cultivation, the tracts of land in said complaint mentioned, as is in this answer hereinbefore particularly set out, and here for brevity referred to; that said list or plat of lands selected and confirmed to said company was never filed in the recorder's office of Lafayette county, that being the county in which the said lands in said complaint mentioned were then situate.

That as soon as defendant understood that the said com-
288 pany was in a condition to make title to said lands, he offered

to said company the consideration for said three tracts of land in said complaint mentioned at $2.50 per acre, and demanded a deed for the same, but was refused, the particulars of which tender of said price have been hereinbefore stated, and are here referred to. That said deed was made to said Allen while this defendant held actual possession of the said tracts of land mentioned in said complaint; and such deed having been so executed, and in open and direct violation of the provisions of the said act of Arkansas, which is by section 7 thereof declared to be a "public act, and to be favorably construed and declared in all courts and places whatsoever," it is submitted that said deed is void, and conveys the said Allen no right, title, or claim in or to the said lands, or to any part thereof.

And for a further answer and defence defendant says:

289 That by the act of Arkansas, of Feb'y 1st, 1859, it is provided, in substance, that every person who, on the 1st Nov., 1858, resided on or cultivated any improvement on any of the lands granted by Congress to the State by said act of Feb'y 9th, 1853, may purchase from the C. and F. R. R. Co. at $2.50 per acre 160 acres, which may include the actual residence or farm of such person as he may elect, by complying with certain conditions prescribed in the act of Arkansas, of November 26th, 1856, and which conditions were in substance that such claimant should have until three months after the Cairo and Fulton R. R. Co. should file a list or plat of the lands in any county confirmed to said company in the recorder's office of said county, to file the proof of his claim to such lands in the office of the auditor of the State; and it was provided by said act of Feb'y 1, 1859, that while the company was in default in regard to the filing of this list or plat that the owners of such improvement shall be entitled to use and occupy the

290 same free of rent or charges.

And said defendant avers the fact to be that on the 1st Nov., 1858, he cultivated as and for his own an improvement on the tracts of land in said complainant mentioned.

That said company has never as yet filed in the office of the recorder of the county in which said lands were or are situated the list or plat required by said act; that this defendant relys on the protection of this statute to occupy said lands until such list or plat is filed, free of rent and charges, and also on the fact of his claim to said tracts of land as owner thereof, by virtue of his tender of the price of the same, $2.50 per acre, as fixed in and by said act of 1859, having been made by him.

And for a further answer and defence said defendant says:

That the act of Ark., approved March 28, '71, provides, in substance, that where any settler who, on or before the 8th of March, 1870, was residing and [or] made improvements of such set-

291 tler, at not exceeding $2.50 per acre in preference to any and all other persons, for 3 months after said land has been advertised according to law.

And defendant avers that he was, on or before the 8th March, 1870, such a settler upon said 120 acres land in said N. E. ¼ of 30;

that he has tendered the price therefor, as fixed in said act; all of which has been particularly hereinbefore set forth, and for sake of brevity is now here thus referred to. And he is entitled to the preference right to purchase the same at the price fixed at any time within three months after the same shall have been advertised for sale, which said lands, defendant avers, have never yet in any way or at any time been advertised for sale.

And for a further answer and defence defendant says:

That the act of Arkansas, of Mar. 28, 1871, entitled "An act to protect the rights of settlers on railroad lands," provides, in
292 substance, that when any persons are in the occupancy of said lands (meaning the lands as those in this complaint mentioned) under and by virtue of the act of Congress of Feb'y 9th, 1853, or of the acts of Arkansas of Jan'y 16, 1855, Nov. 26, 1856, and Feb'y 1, 1859, they shall remain in the peaceable possession of the same, provided that the said act of Mar. 28, 1871, shall not be construed as to prevent the Cairo and Fulton Raildroad Co., and its branches, from bringing suit for the recovery of said lands.

And defendant avers the truth to be that on and before the said 28th day of March, 1871, he was occupying the lands in this complaint mentioned under and by virtue of the acts of Congress and the above-recited acts of Arkansas, and that this suit is not brought against him as such occupant by the Cairo and Fulton R. R. Co., and therefore he prays that it may be dismissed.

293 And for a further answer and defense defendant says:

That the State of Arkansas, by and under her laws on that behalf made, saved, reserved, and granted to settlers on any of the tracts of said grant so transferred to and in aid of the Cairo and Fulton Railroad Co., all and every of such tracts, not to exceed 160 acres, provided they should pay said company $2.50 per acre therefor.

And said defendant avers that he was before the passage of said laws, ever since has been, and now is, such a settler on the lands mentioned in said complaint as brings him fully within the provision of said laws of Arkansas, and makes him the grantee of said tracts and entitled to a deed therefor. That he, within a reasonable time after said company was in condition to make title thereto, tendered to said company said price so fixed by the State, which they refused.

294 And defendant for further answer and defense says:

That by said act of Congress, of Feb'y 9th, 1853, making said grant of lands to aid of said — it is provided, in substance, that if, when the line of said road should be definitely fixed, it should appear that the right of pre-emption to any of said even-numbered sections had attached, then the said company should select other lands in lieu thereof.

And this defendant avers the truth to be that prior to said act of Feb'y 9th, 1853, his right of pre-emption to the tracts in said complaint mentioned had become attached thereto under the laws of the United States, by virtue of his settlement and cultivation of said tracts, as has been hereinbefore particularly set forth, and which

right of pre-emption has continued from its inception down to the present time, and now exists in full force and virtue.

And for a further answer and defence said defendant says:

295 That the act of Congress of Feb'y 9th, 1853, did not, as of that date, grant to the State of Arkansas, for the purpose of aiding in the construction of the Cairo and Fulton railroad, every alternate section of the public lands of the U. S., designated by even numbers, for six sections in width on each side of said road. That said grant remained and was inchoate on and after said 9th of Feb'y, 1853, and until the 16th day of January, 1855, on which date the State of Ardansas, by its General Assembly, definitely fixed and adopted the line or route of said road. That it was not until this said 18th day of January, 1855, that the inchoate condition of this grant was ended and perfected into a grant of any particular even-numbered section of the public lands of the U. S.

That previous to the said 18th day of January, 1855, and while the said grant of Feb'y 9, 1853, remained and was inchoate,

296 Congress, on the 27th day of March, 1854, passed the act entitled An act for the relief of settlers on lands reserved for railroad purposes, providing, in substance, that every settler on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them, provided they shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day fixed by the President's proclamation for the restoring said lands to market.

And defendant avers the fact to be that prior to and ever since the said 27th day of March, 1854, he was, has been, and now is, a settler on the lands mentioned in said complaint, holding, cultiva-

297 ting, and claiming the same under the laws of the United States as such settler. That it was not until the day when said line or route of said road was definitely fixed by the State of Arkansas that any right to the even numbered sections vested in the State of Arkansas, or in said Cairo and Fulton Railroad Co. That the said definitely fixing of the line or route of said road on the said 16th day of January, 1855, was, in law, a reservation and withdrawal from market in consequence of said proposed railroad of all the even-numbered sections of the land of the U. S., for six sections in width on each side of said road, including the lands in said complaint mentioned; and that from the said 27th day of March, 1854, down to the present time, no rules and regulations have been prescribed by the Secretaay of the Interior for the proving up and paying for such lands by such settlers, nor has any day been

298 fixed by the proclamation of the President of the U. S. for the restoring of said lands to market.

And defendant, for further answer and defence, says:

That the lands mentioned in said complaint were with others, on the 9th of Feb'y, 1853, granted by Congress to the State to aid in the construction of the Cairo and Fulton Railroad, conditioned that,

if the road was not completed within 10 years, all the unsold lands should revert to the United States.

That afterwards and before this grant was transferred by the State to the C. and F. R. R. Co., namely, on the 27th of March, 1854, Congress passed an act entitled An act for the relief of settlers on lands reserved for railroad purposes, and providing therein, in substance, that every settler on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled
299 to pre-emption at the ordinary minimum to the lands settled on and cultivated by them, provided they shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day fixed by the President's proclamation for the restoring said lands to market.

That afterwards, on the 26th day of November, 1856, this grant of lands was transferred by the State to the Cairo and Fulton Railroad Co., "subject to all the conditions, limitations, and restrictions in the act of Congress of Feb'y 9, 1853, and in the said act of Congress for the relief of settlers on lands reserved for railroad purposes."

That afterwards, to wit, on the 9th day of February, 1863, the said period of ten years having expired, and the condition of said grant having been wholly unperformed, the lands in said complaint specially mentioned, with all the other lands of the grant then unsold, reverted to the United States.

300 That afterwards, to wit, on the 28th day of July, 1866, Congress revived and extended the act of Feb'y 9th, 1853, for another term of 10 years, counting from said 28th day of July, 1866, and all the land granted by said act of Feb'y 9, 1853, which had reverted to the United States were restored to the same custody, control, and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversions took effect; and all the lands mentioned in said act of July, 1866, were thereby reserved from entry, pre-emption, or appropriation to any other purpose for the term of ten years from said 28th July, 1866.

And this defendant avers the truth to be that, prior to and ever since the 27th day of March, 1854, he was, has been, and now is, a settler on certain public lands of the United States, (viz., the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 30 and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 30, T. 15 S., R. 28 W.,) which, by the said act of 28th July, 1866,
301 were withdrawn from market in consequence of proposed railroads, and he is entitled to pre-emption to such public lands, (which lands are the same lands mentioned in said complaint,) at the ordinary minimum, provided he shall prove up his rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day fixed by the President's proclamation for the restoring of said lands to market; but this defendant says that, although he is ready to prove up and pay for said lands, yet no rules and regulations therefor have been prescribed by the Secretary of the Interior, nor has any

day been fixed by the proclamation of the President of the U. S. for the restoring of said lands to market.

And defendant demurs to said complaint.

Wherefore defendant prays that said complaint may be
302 dismissed, and his possession to said lands quieted, and for other proper relief.

GALLAGHER AND NEWTON, AND
JOHN E. KNIGHT, *Def'ts Attorneys.*

STATE OF ARKANSAS, *County of Miller, Eastern District of Arkansas.*

I, John B. Nix, defendant in the foregoing suit named, wherein Thomas Allen is plaintiff and I am defendant, do state on oath that I believe the statements in the foregoing answer contained are true.

JOHN B. NIX.

Sworn to and subscribed before me, this 21st day of August, 1876.

[SEAL.] W. J. WATSON, *Clerk.*
By THOS. ORR, *D. C.*

Here follows Exhibit No. 1, which will be found on pages 34, 35, and 36.

303 UNITED STATES OF AMERICA, *Eastern District of Arkansas.*

Be it remembered, that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 8th day of April, anno Domini one thousand eight hundred and seventy-eight, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit: On May 24, 1878, comes the said plaintiff, by J. M. Moore, his attorney, and the said defendant, by Gallagher and Newton, his attorneys, and the court being now well and sufficiently advised of the matters of law arising on the demurrer of the plaintiff to the 1, 6, 7, 8, 9½, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 paragraphs of defendant's answer, doth sustain the said demurrer to each and every of the paragraphs aforesaid of said answer, and the motion of said plaintiff to require the defendant
304 to make paragraphs two and three of his answer more specific, is denied, upon the ground that said paragraphs are, and were intended by the pleader to be, denials of material allegations contained in the complaint. And the motion of said plaintiff to strike out paragraphs 4, 5, 10, and 11 of the defendant's answer is overruled as to paragraph 4, because the same is in legal effect a denial of the alleged consolidation of railroads set up in the complaint, and which is a material allegation; and said motion is overruled as to paragraph 5 of said answer, because the same is in legal effect a denial of the purchase of the lands in controversy by the plaintiff from the St. Louis, Iron Mountain and Southern Railway Co., which is a material allegation in plaintiff's complaint; and said motion is sustained as to paragraphs 10 and 11, and the plaintiff is required in a reasonable time to amend his complaint,

305 setting forth therein "all deeds and other written evidences of title on which he relies for the maintenance of his suit;" and the defendant is granted reasonable time to file exceptions thereto, as provided by act of the General Assembly of this State, approved March 5, 1875.

Whicl. demurrer is as follows:

The plaintiff demurs to the paragraphs of said answer numbered respectively 1, 6, 7, 8, 9, 9½, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, because they, nor either of them, state facts sufficient to constitute a defence to plaintiff's said cause of action.

J. M. MOORE, *for Pl'tff.*

Which motion to strike [out] is as follows:

And now comes the plaintiff and moves the court to require
306 the defendant to make more definite and certain the paragraphs in his said answer numbered 2, 3.

And to strike from said answer paragraphs numbered 4, 5, 10, and 11, because the same do not tender any issue of fact, but plead mere conclusions of law, and are not relevant or responsive to the issues tendered in said complaint.

J. M. MOORE.
For Pl'tff.

And on June 24, 1878, the following proceedings were had:

Comes the plaintiff, by John M. Moore, his attorney, and, by leave of the court, amends his complaint by interlining the same, and files exhibits to the complaint.

307 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and seventy-eight, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on December 24, 1878.

Comes the defendant, by R. C. Newton and P. C. Dooley, Esq's, his attorneys, and files herein his exceptions to the documentary evidence filed by the plaintiff.

Which exceptions are as follows:

Comes said defendant and, under the statute in such case made and provided, excepts to the documentary evidence filed in this cause by the plaintiff, and objects to the filing of the same
308 and the use thereof on the trial of this cause, because:

Exhibit A is a deed appointing James M. Loughborough attorney-in-fact for the St. L., I. M. and S. R'y, to sell and convey her lands for her, and did not confer upon the said Loughborough any power to sell and convey any of the lands of the Cairo and Fulton R. R. Co.

Exhibit B. pretends to be a conveyance by said Loughborough, as such attorney-in-fact, of lands of the St. L., I. M. and S. R'y, to

which lands, in all of said documentary evidence filed in this cause, there is no showing of any conveyance or transfer of the said lands by and from the said C. and F. R. R. Co. to the said St. L., I. M. and S. R'y Co., or that said St. L., I. M. and S. R'y Co. ever had any right or power to authorize the sale of, or to sell any of, the lands of the Cairo and Fulton R. R. Co., the lands in suit being by the bill averred to belong to the grant of lands to said C. and F. R. R. Co.

309 Exhibit No. 2 is not such a "certificate" as the laws of Arkansas permit an action of ejectment to be founded upon, and shows no legal title to the lands in controversy to be in the said St. L., I. M. and S. R'y Co., the grantor thereof, to the said plaintiff,

Because by the exhibit entitled, "The acts and proceedings for consolidating, &c.," it appears:

That said pretended consolidation was unlawful under the laws of Missouri, being in effect a consolidation of competing roads, contrary to law of that State. (See proviso of Sec. 3, p. 5, of said Exhibit.)

And also because by said exhibit it appears that the consolidation which it is claimed by the plaintiff tranferred the lands of the Cairo and Fulton R. R. Co. (including these lands now in controversy) to the said St. L., I. M. and S. R'y Co. could not have such effect under the laws of Arkansas, and that the said consoli-

310 dation had effect, if any, only to consolidate the business of the roads for a through line of transportation, and did not transfer the lands of the C. and F. Co. or "consolidate" them with the property of the St. L., I. M. and S. R'y Co.

That the act of this State, given on page 6 of said exhibit, is irrelevant to the cause, and relates to and is restrained in its operation and effect to the area within the boundaries of Arkansas, and to the purchase and holding, and to the consolidation of R. R. companies holding and operating roads in Arkansas, and does not relate to such consolidation of Arkansas roads and companies with roads and companies of other States.

That the Arkansas act, on page 7 of said exhibit, is of no force as showing any lawful authority and power for the consolidation of the Arkansas (Cairo and Fulton Co.) company, with all its franchises and property (including the lands in this suit) in a

311 company existing in an adjoining State, by and under the laws of such adjoining State.

That the copy of the proceedings commencing on p. 19 touching the pretended consolidation of the C. and F. R. R. Co. with the Missouri Co. is irrelevant, and that agreement there copied is without force, because there was no lawful authority in the C. and F. R. R. Co. in Arkansas to agree to merge its "capital stock," "franchises," and "property," so that they might and should become the capital stock, franchises, and property of the St. L., I. M. and S. R'y Co., and that the agreement to that effect as shown on page 19 of said exhibit (last paragraph but one) was and is unlawful, and ought not to be read or used as evidence of any such consolidation as is claimed in

this suit, and the whole of said agreement ought to be excluded as having been made without authority of law and as evidence not pertinent to this cause. And because the said exhibit of the
312 "acts and proceedings" nowhere shows any lawful authority in the C. and F. R. R. Co. to "merge" and consolidate the lands of said C. and F. R. R. Co. with the St. L., I. M. and S. R'y Co., so that they should become the lands of the St. L., I. M. and S. R'y Co.

That the whole of the documentary evidence filed in said cause by the plaintiff is of no avail and ought not to be used on the trial, because it does not show lawful transfer or conveyance of said lands in controversy by the C. and F. R. R. Co. to the said St. L., I. M. and S. R'y Co. And also, no patent is shown as ever having been issued for the lands here in suit, and without which there can be no recovery by the plaintiff in this cause, the act of Congress requiring a patent to be issued for the lands thereby granted. See Sec. 2 of act of Congress, July 28, 1866.

Wherefore said defendant prays that the whole of said
313 documentary evidence filed herein by the plaintiff, be, for the exceptions and objections herein stated, not used or allowed to be read on the trial of this cause.

JOHN E. KNIGHT AND
R. C. NEWTON,
For Def't.

314 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and seventy-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 17, 1879:

This day came the plaintiff, by John M. Moore, his attorney, and the defendant, by R. C. Newton, his attorney, and the exceptions heretofore filed by the defendant to the deeds and other evidences of title filed by the plaintiff, with his complaint, having been argued and submitted to the court the same are by the court overruled.

Thereupon this cause is submitted to the court upon the deeds and other evidences of title filed by the plaintiff with his
315 complaint herein and the court doth find that the plaintiff is the owner and entitled to the possession of the land sued for, to wit, The W. ½ of N. E. ¼ and the S. E. ¼ of the N. E. ¼ of section 30, township 15 S., R. 28 west.

And the plaintiff waiving damages for the detention of said land, it is accordingly adjudged that he recover of the defendant the possession of the aforesaid land, and have a writ of possession therefor; also that he recover of the defendant all his costs in this cause expended, and have execution therefor; and to the overruling of

his exceptions, and the finding and judgment of the court in said cause, the defendant at the time excepted.

And on April 18, 1879, the following proceedings were had:

Comes the defendant by Byrne and Newton, his attorneys, and files herein his motion for a new trial.

316 Which motion for a new trial is as follows:

Comes the defendant, John B. Nix, by his attorneys, and moves the court to set aside the judgment rendered herein, and grant him a new trial upon the following grounds, to wit:

1st. Because the court erred in sustaining the demurrer of plaintiff to the 13 and 17 paragraphs of defendant's answer, wherein he alleges that under and by virtue of an act of the General Assembly of the State of Arkansas, approved the 28th of March, 1871, giving to persons residing on and made improvements on lands belonging to the Cairo and Fulton railroad, on or before the 8th day of March, 1870, not to exceed 160 acres, and include the homestead of said settler, should have the preference right to any and all other persons to purchase same from said company at $2.50 per acre,

317 from and after the passage of said act, and for three (3) months after said lands have been advertised according to law.

And as shown, this defendant made tender to the authorized agent of said company the full price of the land sued for in this action within the time prescribed by law, and further showing that he resided on said lands and made improvements thereon long before the 8th of March, 1870.

2nd. Because the court erred in sustaining the demurrer of plaintiff to the 1, 6, 7, 8, 9, 9½, 14, 15, 16, 18, 19, 20, 21, 22 paragraphs of defendant's answer.

3rd. Because the verdict and decision is not sustained by the evidence.

4th. Because the verdict and judgment is contrary to the law of the case.

R. C. NEWTON AND
L. A. BYRNE,
Defendant's Att'ys.

318 And on April 19, 1879, the following proceedings were had:

Comes the plaintiff by J. M. Moore, his attorney, and comes the defendant, by Newton and Byrne, his attorneys, and now the court being well and sufficiently advised of the matters arising on defendant's motion for a new trial herein, considers that the same be denied. It is further ordered that the judgment heretofore entered herein at a previous day of this term shall not prejudice the right of defendant to bring his bill in equity against the plaintiff for the land in controversy, if he shall be so advised.

319 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

I, Ralph L. Goodrich, clerk of the circuit court of the United

States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said court, this 23d day of June, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States of America the one hundred and fifth.

[SEAL.] Attest: RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 20. John B. Nix, appellant, *vs.* Thomas Allen. Filed 2nd September, 1881.

112-129

Office Supreme Court U. S.
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JUL 10 1884
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

October Term 1884.—No. 20.

JOHN B. NIX, APPELLANT,

vs.

THOMAS ALLEN'S HEIRS, &c., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLANT.

John B. Nix filed a bill in equity in the Circuit Court of the United States for the eastern district of Arkansas against Thomas Allen, to establish his claim to the west half and the southeast quarter of the northeast quarter of section 30, in township 15 south, range 28 west, in Miller county, Arkansas, and to hold Allen to be a trustee for him as to such land, and Allen be compelled to convey the same to him.

On answers filed, and depositions on both sides, a hearing was had, and the court below decided in favor of Allen, and dismissed the complaint; and Nix appealed to this court. (Trans., pp. 30, 31.)

Nix alleges for error, that the court below dissolved the injunction in the case and dismissed the complaint, when

it should have made the injunction perpetual, and decreed in his favor, as prayed in the complaint.

Allen claims that the land was granted to the Cairo & Fulton Railroad Company, under act of Congress of February 9th, 1853, and that he purchased from the railroad company.

Nix claims that the land was never granted to the railroad company, but was expressly reserved and excepted out of their grant; that his mother, Sarah Nix, who was then a widow-woman, the head of a family, and an American citizen, setted upon the land in controversy in 1846 with the view of pre-empting the land. The fact of her settlement at that time, and continuous residence thereon until she died, and the continuous residence of her son, John B. Nix, the plaintiff, ever since, are unquestioned. (See depositions of Woodruff, Kirby, and others on behalf of Nix, Trans., pp. 46–85.)

The fact that Mrs. Nix or her son, at the passage of the act of Congress of February 9, 1853, granting to the State of Arkansas the alternate sections to build a railroad from Fulton to Cairo, was a settler upon, and had the right to pre-empt, the land in dispute, is unquestioned. (See same depositions.)

The question, then, is, when and how did she and her heirs lose the right to pre-empt the lands.

First, let us look at the acts of Congress, and see if they ever took, or even pretended to take, away her right to pre-empt this land. Congress, by an act approved February 9, 1853, (see 10 Stats. at Large, p. 155,) granted to the State of Arkansas, for the purpose of aiding in making a railroad from Cairo to the Texas boundary-line, near

Fulton, every alternate section for six sections in width; but the same act (sec. 2) provided that where the United States had sold any part of a section in said grant, or the right of pre-emption had attached to the same, then the company was to select other lands, within fifteen miles of the road, in lieu of the lands thus sold or pre-empted. So that the very act, that under which the railroad company claims their grant, expressly excepts lands to which the right of pre-emption had attached. Then, by the very terms of this act, the railroad company acquired no right, title, or claim, either in law or equity, to this land in controversy.

Under this law the railroad company could no more gain a title to this land to which this poor old widow-woman's right of pre-emption had attached than to any quarter-section that the government had sold and patented. Both are treated exactly alike in the act of February 9, 1853. Neither was granted to the railroad company. Other lands were given to the company in lieu of such lands.

Does not the provision in the act allowing the company the right to select, within fifteen miles, other lands in lieu of the lands sold and of the lands to which the right of pre-emption had attached, show that it was the intention and policy of the government to protect the interests of the pioneers that had endured the hardships of going into the wilderness and clearing out the cane and the forests, and bringing the land into a state of cultivation, and at the same time compensate the railroad company by allowing them to select other lands?

It is well settled doctrine that in a grant to a railroad, where exceptions are made in favor of pre-emption, homestead, and other claims, that nothing named in the exception passes to the railroad company; that is, the railroad

company has no interest whatever in the lands that are excepted; that the grants are grants *in presenti*, and take effect as soon as the roads are located; and whatever rights the roads acquire pass then.

Newhall v. *Sanger*, 92 U. S., 761.
L., L. & G. R. R. Co. v. *U. S.*, 2 Ib., 733.
Baldwin's Case, 103 Ib., 426.
Van Wyck's Case, 106 Ib., 360.
McLaughlin's Case, 107 Ib., 526.
R. R. Co. v. *Fremont Co.*, 9 Wall., 89.
Schulenberg v. *Harriman*, 21 Wall., 44.

In the case of *Newhall* v. *Sanger*, the court held that a bogus Mexican grant that was *sub judice* at the time of the grant, and was afterwards adjudicated to be no grant, but to be the land of the United States, did not relate back to the time of the railroad-grant act, and pass to the railroad.

In this case it is conceded that at the time of the grant Mrs. Nix had the right to pre-empt the land. The land officer recognized this right when she filed her declaratory statement, April 20, 1853, which was before the location of the road, and which was, according to *Johnson* v. *Towsley*, 13 Wall., 72, in ample time to secure her rights.

Now, under the principle laid down in the case of *Newhall* v. *Sanger*, no right, either in law or equity, passed to the State or the railroad company to said quarter-section of land, or any part of it, at the time of the grant and location under the act of February 9, 1853. And as none passed at that time, none could accrue to either of them under the act afterwards, even if we admit that Mrs. Nix and heirs did abandon or lose their right of pre-emption, as claimed by the railroad company.

If the lands did not pass to the company under the grant, the act of the Land Department in certifying was void.

See *Wilcox* v. *Jackson*, 13 Peters, 498.

Then, under the act of February 9, 1853, there is nothing that took away Mrs. Nix's right to her pre-emption, and nothing that gave the State or the railroad company any right to the land.

But we are not confined alone to the act of February 9, 1853, to maintain Nix's rights to the land.

Congress passed an act entitled "An act for the relief of settlers on lands reserved for railroad purposes," approved March 27, 1854. (See 10 Stat. at Large, p. 269.) This was an act that prescribed how pre-emptors within the lines of railroad grants could secure their rights. This act, beyond question, secured to Mrs. Nix and her heirs all their rights.

The act is short, and in the following language:

"That every settler on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption, at the ordinary minimum, to the lands settled on and cultivated by them: *Provided*, They shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day that may be fixed by the President's proclamation for the restoration of said lands to market."

The legislature of Arkansas in granting the lands to the Cairo & Fulton Railroad Company expressly provided that the company should take them—

"Subject to all the conditions, limitations, and restrictions contained in the act of Congress aforesaid, (meaning February 9, 1853,) and in the act of Congress entitled 'An act for the relief of settlers on lands reserved for railroad purposes,' approved March 27, 1854."

See act of November 26, 1856, in Pamphlet Acts of Arkansas, 1856, p. 4.

This act gave Mrs. Nix until the day fixed by the President's proclamation for the restoration of said lands to market to pay for the same. This we will show was strictly complied with.

If this act was strictly complied with, why has not John B. Nix, the heir of Sarah Nix, a better right under the laws to this land than any one else?

But it is contended on the part of Allen that Mrs. Nix and her heirs lost their rights on account of the act of Congress approved June 21, 1866. This act did not pretend to disturb any right that any party had acquired to any land, but simply provided that after the passage of that act all the public lands in the Southern States should be disposed of according to the provisions of the homestead laws of May 10, 1862, and March 21, 1864.

The act of March 27, 1854, was a special statute for the relief of settlers on lands reserved for railroad purposes. The act of June 21, 1866, was a general act applying to Arkansas, Alabama, Mississippi, Louisiana, and Florida, and had no general or special repealing clause.

It is a well settled rule of construction that a general statute does not repeal a special statute, except that the special statute is expressly named in the general statute. (*Ex-parte* Crow Dog, 110 U. S., 556.) The act of June 21, 1866, does not pretend to repeal any act, either special or general.

McFarland v. *State Bank*, 4 Ark., 410.
State v. *Watts*, 23 Ark., 304.

Besides, the acts of Mrs. Nix and her son gave such a vested right in the land that Congress could not take away or abridge in the least. Under the most rigid rules, as applied by this court, if the reading of the general act of June

21st, 1866, was to the effect of interfering with parties situated as Nix was as to this land, it would be unavailing, for the land had passed out of the public domain, and therefore beyond the control of Congress.

Hughes v. *United States*, 4 Wall., 232.
Frisbie v. *Whiting*, 9 Ib., 187.
Yosemite Case, 15 Ib., 86.
Shepley v. *Cowan*, 91 U. S., 338.
Br. Co. v. *R. R. Co.*, 92 U. S., 319.
Atherton v. *Fowler*, 96 U. S., 514.
Hosmer v. *Wallace*, 97 U. S., 581.
Wirth v. *Branson*, 98 U. S., 121.
Simmonds v. *Wagner*, 101 U. S., 261.

It is also claimed that John B. Nix did not conform to the instructions of March 22, 1870. These instructions were based upon the act of March 27, 1854, and the act of June 2, 1862, and, among other things, said:

"Therefore, in accordance with instructions from the Secretary of the Interior, it is ordered that all settlers on *lands surveyed* at date of settlement, and within the lateral limits of withdrawals for railroad purposes, where settlement was made prior to withdrawal, shall be required to file their declaratory statements within three months from the first day of June, 1870, and thereafter make proof and payment, as required by law."

This was the part of the instructions of 1870 applicable to this case. The lands were surveyed at the time of Mrs. Nix's settlement. The settlement was made on lands within the lateral limits of withdrawal for railroad purposes. The settlement was made prior to the withdrawal.

Now, this was the Nix case; and what did the instructions require of such a case? Simply this:

First. File declaratory statement within three months from the first day of June, 1870.

Second. Thereafter make proof and payment according to law.

Let us see what was done in this case: Nix did not file any declaratory statement, because his mother had already filed a declaratory statement, April 20, 1853, (see copy attached to answer of Allen, Trans., p. 17–18,) and no other declaratory statement was necessary. This part of the instructions only applied to those who had not filed previous to instructions their declaratory statement. So this part of the instructions was complied with.

Did they comply with the next requirement—make proof and payment according to law? In order to determine this, it is necessary to look and see what the law is in regard to payment.

The act of March 27, 1854, expressly provided that proof and payment shall be made prior to the day that may be fixed by the President's proclamation for the restoration of the lands to market.

10 Stat. at Large, 269.

On the 8th day of October, 1877, the President issued his proclamation restoring the lands to market on the 4th day of February, 1878, and called upon parties who had pre-emption claims to prove up before that day. (See copy of proclamation attached to Nix's bill, Trans., p. 9.)

John B. Nix made proof, and paid the money, and received a Register's receipt for the same January 22, 1878, which was in strict accordance with the law of March 27,

1854, the only law applicable to the case. So it is John B. Nix literally complied with instructions of 1870.

Moore v. *Robbins*, 96 U. S., 530.

Unquestionably, then, under the laws of Congress and instructions thereunder, there is nothing that destroys Nix's pre-emption rights; but, on the contrary, Nix strictly complied with every law and instruction.

Now, see if Mrs. Sarah Nix, or John B. Nix, her heir and son, by their own acts, ever forfeited their right to pre-empt the whole of said quarter-section. The settlement, cultivation, and improvement and declaratory statement, April 20, 1853, of Mrs. Sarah Nix, are undisputed; in fact, they are conceded by Allen in his answer; but he alleges that she lost that right because she, March 31, 1854, made application to and did purchase the N. E. ¼ of the N. E. ¼ of sec. 30, township 15 south, range 28 west. But let us look at the facts in regard to this pretended application and purchase, and see whether this was an abandonment or not.

Benjamin Nix swears (see his deposition, Trans., pp. 52 and 63, *et seq.*) that he, as guardian of John B. Nix, received a small amount of money that his ward, John B. Nix, had inherited, and that he himself went to Washington, Hempstead county, with this money, and paid for forty acres, on Mrs. Nix's declaratory statement; that Mrs. Nix was not there, and had nothing to do with it; that she was sick, and was not at Washington any time during that year.

Now, in this connection, and as fully sustaining and corroborating Benjamin Nix's testimony in this respect, special attention is called to pretended application to purchase the N. E. ¼ of N. E. ¼ of sec. 30, township 15, range 28 west, which is attached to the answer of Allen, and marked "Exhibit D," and is in words and figures as follows:

"LAND OFFICE AT WASHINGTON, ARK.,

"No. 7987. *March* 31, 1854.

"I, Sarah Nix, of Lafayette county, Arkansas, do hereby apply to purchase the northeast quarter of the northeast quarter of section thirty (30), in township fifteen (15) south, of range twenty-eight (28) west, containing forty (40) acres, according to the returns of the Surveyor-General, for which I have agreed with the Register to give at the rate of one dollar and twenty-five cents per acre."

....

"I, Benj. P. Jett, Register of the Land Office at Washington, Ark., do hereby certify that the lot above described contains forty (40) acres, as mentioned above, and that the price agreed upon is one dollar and twenty-five cents per acre.

"BENJ. P. JETT, *Register.*"

(Trans., p. 18.)

It will be noticed that this application is not signed by Mrs. Nix, or any one else, which fully corroborates and sustains Benjamin Nix's testimony, when he says Mrs. Nix was not there, and had nothing to do with it, and did not furnish any of the money to make the payment.

How could Mrs. Nix lose any of her rights by an outside volunteer going to the Land Office and paying in her name, with money not belonging to her, for a portion of the land on her declaratory statement?

Can Mrs. Nix or John B. Nix, her son and heir, be prejudiced or lose their rights because the Register of the Land Office fraudulently put in an application to purchase a part of the land in Mrs. Nix's declaratory statement, without Mrs. Nix's or any one else's name being signed to it?

Can the "ignorance, negligence, or want of fidelity" of the Register of the Washington Land Office take away or

in any respect curtail the rights of Mrs. Nix under her declaratory statement?

Washburn on Real Property, 3d vol., 3d ed., p. 176.
Nelson v. *Sims*, 23 Miss., 283.
Hughes v. *United States*, 4 Wall., 232.
Johnson v. *Towsley*, 13 Wall., 72.

In the case of *Sheply* v. *Cowan*, 91 U. S., 330, this court holds that, where land officers "are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts when a controversy arises between parties, founded upon their decisions."

Moore v. *Robbins*, *sup.*
Rector v. *Gibbons*, 111 U. S., and cases cited.

Are not these propositions applicable in this case? Was not the allowing of an entry of forty acres included in Mrs. Nix's declaratory statement, without Mrs. Nix, or any one for her, making and signing any application for that purpose, a fraudulent practice upon the part of the Register of the Land Office? Is there any court that will hold that such fraudulent practices can in any way prejudice or curtail the right of Mrs. Nix and her heirs? If so, then it is in the power of any Register of the Land Office to defraud every pre-emptor out of the right to purchase one hundred and twenty acres of his pre-emption claim. Is it not the business of the land officers to protect the rights of pre-emptors, and not to defraud them?

It is submitted that neither Mrs Sarah Nix nor her heir, John B. Nix, ever did anything by which they lost any rights that they had to any part of the N. E. ¼ of sec. 30, township 15 south, range 28 west, when Mrs. Sarah Nix filed her declaratory statement April 20, 1853.

It is claimed that John B. Nix, in proving his claim and paying for the same, and receiving a Register's certificate

for the same, before the day fixed in the President's proclamation for the restoration of the land, did all the law required of him to perfect his right to the land; and having done that, he now has an equitable title that is superior to the title of Thomas Allen.

Lytle v. *State*, 22 How., 193; *S. C.*, 9 How., 314.
Garland v. *Wynn*, 20 How., 6.
Hughes v. *United States*, 4 Wall., 232.
Johnson v. *Towsley*, 13 Wall., 72.
Sheply v. *Cowan*, 1 Otto, 330.
Minnesota v. *Batchelder*, 1 Wall., 100.
Lindsey v. *Hawes*, 2 Black. 554.

When it is borne in mind that in all these grants a liberal construction for the settler is to be indulged in, and a settlement with improvement will save the land from the railroad grant, (*Mining Co.* v. *Consol., &c., Co.*, 102 U. S., 167; *Sherman* v. *Buick*, 93 U. S., 209,) there is no room for cavil as to the Nix right. If more were needed to conclude these questions, it will be found in *Atchison, &c., &c.*, v. *Pracht*, 12 Am. & Eng. R. R. Cases, 267, *et seq.* And in an elaborate opinion by the Secretary of the Interior, December 12th, 1882, in *Perkins* v. *Central Pacific R. R. Co.*, the grounds upon which Nix rests his claim are most fully sustained; there is nothing left in the case to debate about. (*Copp's Land Owner, vol.* 9, *No.* 10, *January*, 1883, *pp.* 201–203.)

While it is plain this court must sustain Nix's right under the United States statutes and decisions, still there is another ground upon which he is entitled to a decree, independent of all United States statutes, except the act of February 9, 1853, and the act of July 28, 1866, reviving the act of February 9, 1853. The act of the General Assembly of the State of Arkansas, approved March 28, 1871,

entitled "An act to protect the rights of settlers on railroad lands," provided—

"That where any settler who, on or before the 8th day of March, 1880, was residing and made improvements on the lands belonging or claimed by the Cairo & Fulton Railroad Company or its branches, shall have the right to purchase the same, not to exceed one hundred and sixty acres, under the legal subdivision of said lands, and including the homestead and improvements of such settler, at not exceeding the rate of two dollars and fifty cents ($2.50) per acre, in preference to any and all other persons, from and after the passage of this act, and for three (3) months after said land has been advertised according to law." (Pamp. Acts of Arkansas, 1871, p. 288.)

The proof shows that Nix tendered $2.50 per acre for the land, within the time prescribed by this law. The agreed statement of facts in this case shows that this land has never been advertised; (Trans., p. 26;) that is to say, the agreed statement of facts shows that the railroad runs through this tract of land. The advertisement under which Allen claims it was advertised expressly excepts all tracts that the railroad runs through; but even admitting that the land was advertised then, the tender was made within the time required by both the advertisement and the law. To avoid this, Allen says that the act of 1871 is void; that it interferes with the railroad's vested rights.

The Supreme Court of Arkansas, in the case of *L. R. & T. S. R. R. Co.* v. *Howells*, 31 Ark., 119, held that a similar act passed in 1859 was valid and binding on the railroad company.

In order to see what right the railroad company had to their lands, let us bear in mind that all of said railroad south of the Arkansas river was built after the passage of the act of 1871, and was not completed until just before the lands were advertised for sale. Now, this court has con-

strued an act, worded exactly like the grant of February 9, 1853. (*Schulenberg et. al.* v. *Harriman*, 21 Wall., 44.) The act of the Wisconsin Legislature, and the act of 1856 of the Arkansas Legislature, are similar; and this court in the above case, in construing the granting acts of Congress and of the Legislatures, say:

"The position, that if the acts of Congress vested in the State a title to the lands designated, that title was transferred by the act of its Legislature, passed March 10, 1869, is equally untenable. The State, by the terms of the grants from Congress, possessed *no authority to dispose of the lands* beyond one hundred and twenty sections, except as the roads in aid of which the grants were made were constructed."

"The acts of Congress made it a condition precedent to the conveyance by the State of any other lands, that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could pass any title to the company."

See, also, *Leav. R. R.* v. *U. S.*, 92 U. S., 741.
Mo. R. R. R. v. *Pac. R. R.*, 97 U. S., 496.
R. R. Co. v. *Alling*, 99 U. S., 475.

According to the decisions of this court, then, the title remained in the State until the section that embraced these lands was built, which was long after the passage of the act of 1871. Now, as the title was in the State at the time of the act of 1871, and as the railroad company accepted the grant from the State with condition that all settlers were to be protected, (see act of 1856,) there can be no reason why the State did not have the right to protect the settlers upon lands that the title to which still remained in her. So, under the act of 1871, construed under the light of the decisions of this court, Nix is entitled to the lands under the State law, and the court should so hold.

The act of revival of July 28, 1866, does not change this rule, because it revives the act of February 9, 1853, and extends the time for ten years, and the lands are "restored to the same custody, control, and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took effect."

There is one thing it is proper to call the court's attentention to, and that is that Nix's possession has been open, notorious, and exclusive for thirty-seven years; and the railroad company and Thomas Allen took the land subject to all the legal and equitable interest of Nix.

Hughes v. *United States*, 4 Wallace, 232.

Whether Nix's rights are measured by the acts of Congress and the decisions under them, or by the acts of the Legislature of Arkansas and the decisions of the Supreme Court of Arkansas, and the decisions of this court, he is still entitled to the decree for the land, and it is respectfully submitted for this purpose the case should be reversed.

A. H. GARLAND,
For Appellant.

112-125

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

JOHN B. NIX,
Appellant,
vs.
THOMAS ALLEN.
No. 20.

BRIEF FOR APPELLEE.

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Attorneys for Appellee.

JOHN F. DILLON,
Of Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS.
1884.

In the Supreme Court of the United States.

October Term, 1884.

JOHN B. NIX,
APPELLANT,
vs.
THOMAS ALLEN.

No. 20.

This case is here on appeal from the decree of the Circuit Court of the United States for the Eastern District of Arkansas.

The controversy involves the equitable title to one hundred and twenty acres of land lying within the six-miles limits of the grant made by Congress to aid in constructing the Cairo & Fulton (now St. Louis, Iron Mountain & Southern) Railroad. The tract is described as the west half and the southeast quarter of the northeast quarter of section *thirty*, in T. 15 S., R. 28 W., Miller county, Arkansas. The grant was of the alternate *even* sections.

Previous to filing the bill of complaint the defendant had procured a judgment for the possession of the premises in an ejectment suit against the complainant.

The bill admits that defendant holds the legal title, as grantee of the Railroad Company, but alleges that the equitable title is in complainant, and asks the Court to restrain defendant from executing his said judgment, and that he be decreed to convey the premises to complainant.

The principal averments of the bill, and amended bill, are

that Sarah Nix, mother of the complainant, and who was qualified to pre-empt lands, settled on the land in dispute in 1846, and made improvements, with the intention of pre-empting it; and that she occupied the same until the date of her death in 1863; that April 22, 1853, she proved up her right to pre-empt the whole of the northeast quarter of said section thirty, which included the land in controversy, but at that time made no payment; that a year later (1854) she paid the Receiver at the local land office fifty dollars, "which was intended as a part payment on the whole, but "the Receiver, instead of making it a part payment on the "whole, issued a patent certificate to the N.E. ¼ of the N. "E. ¼" of said section; that the complainant, as the son and heir of said Sarah Nix, was entitled, under the various pre-emption laws, and especially under the act of Congress approved March 27, 1854, entitled "An act for the relief of "settlers on lands reserved for railroad purposes," to make final proof and entry of said one hundred and twenty acres.

The bill further alleges that under the various statutes of the State affecting said land grant the complainant was entitled to a conveyance of the land from the Railroad Company on tendering to it the sum of $2.50 per acre, and that such tender was seasonably made.

The amended bill denies that Mrs. Nix ever "made pre-"emption proof to the northeast quarter of the northeast "quarter of section 30," and that any record to that effect is "fraudulent and false;" that the "pretended" proof filed by the Register "is absolutely false and untrue."

THE ANSWER.

The answer denies, in substance, that complainant had any right to the land in question, by virtue of the pre-emption laws, either as the son and heir of Sarah Nix or in his

own right, and alleges that Mrs. Nix, on the 20th of April, 1853, and after the grant of said lands to the State, filed a declaratory statement for the whole northeast quarter of said section, and subsequently, on the 31st of March, 1854, made "final proof" as to settlement, &c., of *only* the northeast forty, and abandoned any claim to the balance of the quarter section, which balance is the land in controversy; that complainant at the time said grant was made, and for a long time thereafter, was a minor, incapable of acquiring preemption rights.

The answer further alleges that neither said Sarah Nix nor complainant had or acquired any rights to said premises under the State statutes relating to settlers on railroad lands.

The case was heard on an agreed statement of facts, (Record, 26,) and various exhibits, including the record of the court in the ejectment case.

A decree was rendered dissolving a temporary injunction which had been allowed, and dismissing the bill. From this decree complainant appealed.

STATEMENT.

The record shows the facts necessary to an understanding and decision of this case to be substantially as follows:

ORIGINAL GRANT, 1853.

Congress made a grant of lands to the States of Missouri and Arkansas to aid in the construction of a railroad from a point on the Mississippi river opposite the mouth of the Ohio river, *via* Little Rock, to the Texas boundary near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river. The act was approved Feb. 9, 1853. The grant was for six sections in width on each side of the road,

and with the usual provision, that if it should appear, when the route of the road was definitely fixed, the United States had sold any section or part of section so granted, "or that "the right of pre-emption has attached to the same," &c., then other lands were to be selected in lieu thereof. The lands were to be disposed of by the States in the manner usually provided in similar grants made by Congress.

10 Stat., 155.

STATE LAW, 1855.

The General Assembly of the State of Arkansas, by an act approved January 16, 1855, bestowed this grant, so far as it pertained to the main line of the road lying within the borders of that State, on the Cairo & Fulton R.R. Co., adopting a survey of the route which the Company had already made.

This act contained the following provision:

"That citizens or heads of families, being settlers or oc-
"cupants previous to the passage of this act on the land
"herein transferred to the said Cairo and Fulton Railroad
"Company, shall each be entitled to a preference right of
"entry of any legal subdivision of land not exceeding one
"hundred and sixty acres, which shall be upon such legal
"subdivision as will include the residence of the said settler,
"which preference right shall be at the price of two dollars
"and fifty cents per acre, which preference right of entry
"shall exist from the passage of this act, and for three
"months after notice has been given for three successive
"weeks in a newspaper published in the city of Little Rock
"that the said land is in market."

Whether the Company accepted this grant, or did any of the work of construction under its provisions, does not appear.

STATE LAW, 1856.

This act of 1855 was amended (repealed?) by another act approved November 26, 1856, entitled "An act to amend "an act to aid in the construction of the Cairo & Fulton "Railroad, approved January 16, 1855."

The preamble to this latter enactment sets out the original grant by Congress, under date of February 9, 1853, and alleges that the Cairo & Fulton Railroad Company was organized under a charter granted it January 12, 1853, and made a survey of the road, which was completed in September, 1854, and approved by the Company October 9, 1854, "whereby said line or route so surveyed and reported "was definitely fixed and established in conformity to said "survey." "And whereas, further, the General Assembly "of the State of Arkansas did, by virtue of the provisions "of an act entitled 'An act to aid in the construction of the "'Cairo & Fulton Railroad, approved January 16, 1855,' "adopt and confirm said line or route as surveyed, estab- "lished, and approved, in conformity to said acts of Con- "gress and said General Assembly theretofore enacted: "therefore, be it enacted," &c.

Section one re-enacts the grant to the Company subject to the conditions of the former grant and the grant by Congress, and also subject to the act of Congress entitled "An act for the relief of settlers on lands reserved for R.R. "purposes," approved March 27, 1854.

"SEC. 2. Every person who, on the 9th of February, "1853, occupied by residence and cultivation thereon, any "tract of land comprised in the grant made by virtue of, "and under the provisions of such act of Congress of Feb- "ruary 9, 1853, may purchase from said Fulton and Cairo "Railroad Company at two dollars and fifty cents per acre, "the legal subdivision of such land as shall include his resi-

" dence and actual improvements, not to exceed one quarter " section, by complying with the following conditions:

" SEC. 3. Such claimant shall, within three months after " said lands are selected and confirmed to said Company, and " a list or plat thereof filed in the Recorder's Office, in the " County in which such lands may lie, file with the Auditor " of State, his own affidavit, accompanied by the affidavits " of two disinterested freeholders of his County, describing " the land claimed by legal subdivisions, proving the fact " of such occupancy, residence and cultivation upon such " legal subdivisions with a view to actual cultivation and " settlement, before the day above specified, said Company " may, by giving reasonable notice to such claimant, appear " before the Auditor and controvert the facts set forth in " such affidavits, and the Auditor may swear witnesses, hear " proof, and, for cause shown, set aside any such claims; " *Provided*, That no such claim shall be set aside for mis- " description, or error in form only, founded on mistake; " but on affidavit showing such mistake, reasonable time " may be given for the filing of corrected proof.

" SEC. 4. Said claimant shall, after three months, or " as soon thereafter as said Company shall be in a condi- " tion to make title, pay to said Company the consideration " for said land as hereinbefore provided, whereupon he " shall be entitled to receive from said Company a deed for " the same, but in case of failure to file said proof or pay " said consideration money, within the respective time speci- " fied, the right to make such purchase shall cease."

Section six provides that the Company shall, within two years from the approval of that act, either grade twenty-five miles, or, at its option, complete ten miles of the road.

STATE LAW, 1859.

The General Assembly again legislated concerning this railroad and the land-grant by an act approved February 1, 1859, entitled, " An act concerning the Cairo and Fulton " Railroad and its two branches."

Section one repeals section six of the act of November, 1856, and releases the Company from the bond given for the performance of the conditions of said section.

Section two relates to the branches.

Section three is as follows:

"SEC. 3. *Be it further enacted*, That every person, who, "on the 1st day of November, 1858, resided on or cultivated "any improvement on any of the land comprised in the "grant made by virtue of the act of Congress, approved "February 9, 1853, may purchase from the said Cairo & "Fulton Railroad Company, at two dollars and fifty cents "per acre, one hundred and sixty acres, which may include "the actual residence or the farm of such person, as he or "she chooses to elect, by complying with the conditions "prescribed by an act passed by the last General Assembly "of this State, entitled 'An act to amend an act to aid in "'the construction of the Cairo & Fulton Railroad,' ap- "proved January 16, 1855, which act was approved No- "vember 26, 1856; *And, provided further*, That until such "default mentioned in said act, the owners of such improve- "ments shall be entitled to use and occupy the same free of "rent or charges."

ACT OF CONGRESS REVIVING THE GRANT, 1866.

The time within which the road was to have been constructed by the terms of the original granting act expired in 1866. By reason of the disturbed condition of affairs resulting from the late civil war, the road was not completed.

Congress by an act approved July 28, 1866, revived the grant of 1856, and extended the time for completing the road for the term of ten years. (14 Stat., 338.) The granted lands were made subject to the conditions, trusts, &c., contained in the original grant. It was further provided that as the road was completed in sections of ten

miles each, the Secretary of the Interior, on receiving proof of the completion of any such section, should issue patents for the granted lands lying opposite such completed section, and so on, from time to time, until the whole road was completed, it being further provided that if one section of twenty miles should not be fully constructed within three years from the date of the act, such lands as were unpatented should revert to the United States.

In section 3 it was enacted "that all the lands mentioned "in this act, and hereby granted, are hereby reserved from "entry, pre-emption, or appropriation to any other purpose "than herein contemplated for the said term of ten years "from the passage of this act."

RESOLUTION OF CONGRESS EXTENDING TIME FOR CONSTRUCTION, 1869.

March 3, 1869, (15 Stat., 349,) Congress passed the following resolution, extending the time within which the first section of twenty miles should be completed, and recognizing the Cairo & Fulton R.R. Co. as the legitimate grantee and owner under the original grant:

"*Resolved*, &c., That in case the Cairo & Fulton Rail-"road Company shall complete the first section of twenty "miles of said road by the twenty-eighth day of April, "eighteen hundred and seventy, and the Secretary of the "Interior shall be satisfied of such completion, then the "said Company shall be entitled to its lands in all respects "and to the same extent as it would have been had said "twenty miles been completed by the twenty-eighth of "July, eighteen hundred and sixty-nine, as provided by law "relating to said Railroad Company, approved July twenty-"eighth, eighteen hundred and sixty-six."

SIMILAR RESOLUTION, 1870.

Congress passed a similar resolution May 6, 1870, (16 Stat., 376,) further extending the time to December 20, 1870.

STATE LAW, 1871.

This was an act entitled "An act to protect the rights of "settlers on railroad lands," approved March 28, 1871.

The first section is as follows:

SEC. 1. "That where any settler, who on or before the "eighth day of March, 1870, was residing and made im- "provements on the lands belonging or claimed by the "Cairo and Fulton Railroad Company, or its branches, "shall have the right to purchase the same, not to exceed "one hundred and sixty acres, under the legal subdivision "of said lands, and including the homestead and improve- "ments of such settler, at not exceeding the rate of two "dollars and fifty cents ($2.50) per acre, in preference to "any and all other persons, from and after the passage of "this act, and for three (3) months after said land has been "advertised according to law."

Section 2 provides that persons authorized to purchase under section 1 shall tender the amount of the purchase money to the Company's agent at the principal office, or at the principal office of either branch road, &c.

Section 3 provides that persons in occupancy of any of these lands, by virtue of any of the acts of the Assembly, shall remain in peaceable possession; provided the R.R. Co. may bring suit for their recovery, &c.

Section 4 provides that where such suit is brought the occupant may file his affidavit, corroborated by the affidavits of two disinterested witnesses, stating the value of his improvements, and offering to disclaim further interest in the

disputed premises on payment of said amount, and that the plaintiff may pay the amount thus fixed, and have judgment for possession. But unless the plaintiff shows to the court that he has within six months from the filing of said affidavits made tender to the defendant of the amount thus claimed for improvements, his suit is to be peremptorily dismissed, and the costs taxed up to him.

The preamble to this act, and the provisions of section four, show it to be rather an extraordinary piece of legislation, to which we shall take occasion to further invite the attention of the Court.

We have now given the various enactments, both Federal and State, relating directly to the matter in issue.

THE FACTS AS THEY APPEAR ON THE RECORD.

The land, which lies within the granted limits, was withdrawn from market in pursuance of the original grant, May 19, 1853. (Record, 39.)

The right of the Railroad Company attached January 17 1855. (*Ib.*)

The land was listed and approved to the State for the benefit of the Railroad Company, July 13, 1857. (Record, 27 and 39.)

The railroad was completed in 1873, (Record, 15,) and approved as a first-class railroad by the Secretary of the Interior. (Record, 26.)

The Company conveyed the premises in dispute to Thomas Allen, the defendant, May 14, 1875. (Record, 87.)

On the 20th April, 1853, Sarah Nix, mother of the complainant, filed her declaratory statement for the whole of the northeast quarter of said section, alleging that she settled the same on the first day of April, 1853. (Record, 17.)

On the 31st day of March, 1854, she entered as a pre-

emptor the northeast quarter of the northeast quarter of the said section, stating in her final proof, under oath, that she settled on it on the first day of April, 1853. (Record, 32, 33, and 35.)

On the 22d day of September, 1858, said Sarah Nix deeded to the complainant, Jno. B. Nix, the forty acres which she had thus entered. (Record, 43.)

And on the 10th day of December, 1874, a patent for the said forty was issued to said Sarah. (Record, 39.)

Sarah Nix resided on the northeast quarter of the northeast quarter of said section from the date of her settlement on the same as set forth in her declaratory statement and in her final proof, to wit, April 1, 1853, up to the date of her death, in December, 1863. (Record, pp. 17, 18, 35, 37, also bill of complaint.)

John B. Nix lived with his mother on said forty acres during her lifetime, and continued to reside thereon up to the time of filing his bill herein. (Record, 37.)

Said Sarah Nix was the mother of seven children, four of whom were living at the time of her death. Two are still living, namely, the complainant, John B. Nix, and his sister, Ann Watson, who resides in Grayson county, Texas. Four of the daughters and heirs of Sarah Nix have died, leaving children and heirs. (Record, 61.)

John B. Nix was a minor until the 27th day of November, 1857. (Record, 80.)

On March 25, 1878, the application of John B. Nix to enter the land in question under the pre-emption laws, as the heir of Sarah Nix, was rejected by the Commissioner of the General Land Office, from which decision Nix appealed to the Secretary of the Interior, but abandoned the prosecution of his appeal. (Rec., 41 *et seq.*)

ARGUMENT.

The bill of complaint is not at all clear as to the basis of the claim of the appellant for relief, but, as near as can be deduced, he claims—

1st. That under the Federal laws relating to pre-emptions he is the owner, as the heir of his mother, of the equitable title to the land in controversy.

2d. That under the provisions of the State statutes relating to the grant in question, he is entitled to the land as a settler thereon, on the payment of two dollars and fifty cents per acre, which amount he has already seasonably tendered to the Railroad Company.

I.

When Sarah Nix made her final proof and entered the northeast quarter of the northeast quarter of said section 30 she exhausted her right as a pre-emptor. She was forever barred from asserting any other claim under the pre-emption laws.

It is true that in the amendment to the original bill of complaint filed February 12, 1881, (Record, pp. 25 and 26,) it is denied that Mrs. Nix ever made any final proof of the pre-emption of said forty acres, and the charge is made that the records of the Land Office showing such proof are "false and untrue;" and the complainant, in an affidavit filed in the case July 26, 1879, (Record, pp. 18, 19, and 20,) also makes a similar statement.

But the evidence subsequently submitted proves conclusively that she did make the proof and entry as alleged in the answer to the bill, and that she was aware of what she was doing and the effect of her acts.

On the files of the General Land Office are found the following affidavits:

"REGISTER'S OFFICE, WASHINGTON, ARKS.,
"*November* 14, 1854.

"I, Sarah Nix, of Lafayette county, Arks., being de-
" sirous to enter northeast quarter of the northeast quarter
" of section thirty (30), in township fifteen south, of range
" twenty-eight west, in the district of lands subject to sale
" at Washington, Arkansas, under the provisions of the act
" of Congress to appropriate the proceeds of the public
" lands and to grant pre emption rights, do solemnly swear
" that I am a citizen of the United States, a widow, the head
" of a family, over the age of twenty-one years; that I did,
" on the first day of April, 1853, settle and improve the
" above-described tract of land and erect a dwelling thereon,
" and have continued to reside there and cultivate a part of
" the same up to the present time; that I have not hereto-
" fore had the benefit of pre-emption from the Government
" of the United States, nor do I own three hundred and
" twenty acres of lands in any State or Territory of the
" United States, nor have I abandoned a residence on my
" own land to reside on the above tract, and that I now apply
" to enter the above-described tract of land for my own use
" and benefit and not in any way in trust for another, but for
" the purpose of continued actual settlement and cultivation;
" neither have I made any contract or agreement with any per-
" son or persons, directly or indirectly, by which the title which
" I may acquire from the United States shall inure, in whole
" or in part, to the benefit of any person but myself, and
" that I have not acquired from the Government of the
" United States, under the provisions of said graduating act,
" together with this entry, more than three hundred and
" twenty acres, according to the established survey.

"Given under my had this 14th day of November, 1854.

"SARAH $\overset{\text{her}}{\underset{\text{mark.}}{\times}}$ NIX.

"Subscribed and sworn to before me, this 14th day of No-
" vember, 1854.

"BENJ. P. JETT,
"*Register.*

" We, Benj. F. Ryburn and James Cardin, citizens of " Lafayette and Hempstead County, Arkansas, and of the " United States over the age of twenty-one years, do sol- " emnly swear that the above named Sarah Nix settled on, " improved, and erected a dwelling on the northeast quar- " ter of the northeast quarter of section No. thirty (30) " of township No. fifteen, of range No. twenty-eight, on or " about the first day of April, 1853; that he has not quit " nor abandoned h— residence on h— own land to reside " on the public land in said State; that he has resided " thereon from that time until the present, and now resides " thereon, and that he has about thirty acres in cultivation, " and that we are not, directly or indirectly, interested in the " right of pre-emption claimed by said Sarah Nix.

" BENJ. F. RYBURN,

" JAMES his × mark. CARDIN.

" Sworn to and subscribed before me, this 14th day of " November, 1854.

" BENJ. P. JETT,
" *Register.*

" We do hereby certify that the above and foregoing affi- " davits are correct and in accordance with law and instruc- " tions.

" BENJ. P. JETT,
" *Register.*

" _____ _____,
" *Receiver.*"

Record, pp. 35 and 36.

It will be observed that these affidavits bear date November 14, 1854, while the application to enter this forty acres, found on page 18 of the Record, and the entry receipt, found on page 33 of the Record, each are dated March 31, 1854.

The discrepancy in these dates is readily explained. The entry was consummated by Benj. Nix, as the agent of Sarah. (Record, p. 67.) When he went to Washington,

Ark., where the local land office was then located, he was prepared to make the payment of fifty dollars, but not prepared to file the final proof required by the Department. On pages 65 and 66 of the Record, Mr. Nix explains the difficulties he encountered, and what he finally did under the instruction of Register:

"Q. 39. Did you have any trouble in transacting your "business with the Register at the time; if so, state what "it was?

"A. 39. He required that Mrs. Nix should be present "and make proof that she was an actual settler on the land, "and she was not able to go to Washington. Then the "Register required that she should go before a justice of "the peace, and make affidavit that she was an actual set-"tler and then living on the place.

"Q. 40. Do you know whether that was done or not?

"A. 40. It was; a justice of the peace went to her house, "and she made the affidavit.

"Q. 41. Are you positive she did not go to Washington "herself at that time and make proof herself?

"A. 41. I am; she did not go to Washington.

"Cross-examined:

"Q. 1. Did you go to Washington twice about Mrs. Nix's "land matters?

"A. 1. I did; I had to come back and get the affidavit "and then go again.

"Q. 2. Was it the last time that you obtained the re-"ceiver's receipt?

"A. 2. It was."

The final proof, thus secured, was forwarded by the Register and Receiver, with the other papers in the case, to the General Land Office. The case seems to have been reached for examination on or about the 10th of October, 1854, when it was discovered that the proof of settlement, residence, &c., was defective, and was returned to the Register

and Receiver for the necessary corrections. (See letter of Commissioner Wilson, under said date, on page 34 of the Record.) In due course of time the affidavits given above were forwarded to the General Land Office. And even these were not quite perfect, and had to be supplemented with other testimony, as appears by a subsequent letter of the Commissioner, found on pages 34 and 35.

The charges of fraud in connection with this proof seem to have been founded on the fact that the affidavits of November 14, 1854, purport to have been sworn to before the Register at his office in Washington, and the other fact that Mrs. Nix did not go to Washington at the time the entry was made by Benj. Nix, on the 31st of March, 1854; that it became necessary to make new affidavits seems to have been forgotten or overlooked.

That Mrs. Nix made final proof, in some form, at the time the fifty dollars were paid, is clear. In addition to the testimony of Benj. Nix, given above, the complainant himself testifies in his deposition, on page 60 of the Record, as follows:

"Q. 14. Where did your mother make her proof of pre-
"emption?
"A. 14. At Rondo, Arkansas, before Henry Morris, a
"justice of the peace.
"Q. 15. Did your mother make proof of pre-emption at
"any other time than that referred to in your last answer?
"A. 15. If she did I don't remember, except the time
"of the payment of the fifty dollars.
"Q. 16. Did she make further proof of pre-emption
"at the time the fifty dollars were paid?
"A. 16. I am not positive; I think she did."

Again, on page 62:

"Re-examined in chief:
"Q. 1. What is your recollection; did your mother
"make any proof at the time the fifty dollars were paid?

"A. 1. I think she did."

The complainant again testifies, on page 47:

"Some time in 1854 the N. E. quarter of the N. E. quarter was entered at the United States land office at Washington, Hempstead County, Arks., by Ben. Nix, at that time my guardian. The land was entered at that time in the name of my mother, Sarah Nix, but paid for with my money. I was a minor at the time; Ben. Nix was my guardian."

And on page 53 Benj. Nix testifies:

"About the year 1852 or 1853 they entered the forty above described (being the forty in question) at the United States Land Office at Washington, Hempstead County. The family was not able at the time to purchase more. As guardian of John B. Nix I entered the land with the funds belonging to John B. Nix, said John B. Nix being a minor at the time. The Receiver's receipt was taken in the name of Sarah Nix, mother of John B. Nix."

The final proof was eventually made satisfactory to the Department, and a patent for the N. E. quarter of the N. E. quarter of said section 30, issued to Sarah Nix on the 10th of December, 1854, less than thirty days after the date of her affidavit, as above set forth.

The entry of the tract in question by said Sarah Nix, as a pre-emptor, being thus clearly proven, the statute as clearly inhibits her from making any other or further pre-emption claim.

Section 2259 (5 Stat., 455) of the Revised Statutes designates the persons who are entitled to pre-empt public land, and provides that, upon making proper settlement, any such person "is authorized to enter with the Register of the Land-Office for the district in which such land lies, by

"legal subdivisions, any number of acres not exceeding one "hundred and sixty, or a quarter section of land, to include "the residence of such claimant, upon paying to the United "States the minimum price of such land."

Section 2261 (5 Stat., 420) reads as follows:

"SEC. 2261. No person shall be entitled to more than one "pre-emption right by virtue of the provisions of section "twenty-two hundred and fifty-nine; nor where a party has "filed his declaration of intention to claim the benefits of "such provisions, for one tract of land, shall he file, at any "future time, a second declaration for another tract."

In section 2262 it is further provided that before any person claiming the benefits of the pre-emption laws is allowed to enter lands, he shall make oath before the Receiver or Register of the proper land district "that he has never had the "benefit of any right of pre-emption under section twenty-"two hundred and fifty-nine." These provisions are all carried into the Revised Statutes from the acts of Sept. 4, 1841, and March 3, 1843. (5 Stat., pp. 455 and 620.)

The complainant has no rights, and asserts none, under the pre-emption laws, unless they are derived from his mother. The right of the ancestor was exhausted in 1854; there was nothing for the heir to take, on her death, in 1863.

Even though Mrs. Nix, at her death, held an incomplete pre-emption right, the complainant could have no remedy under his bill. He claims as the sole heir of his mother in this regard, and prays that the land in dispute be deeded to him alone. Yet the proof shows that he was only one of several heirs having equal claims with himself.

Section 2269 of the Revised Statutes provides that where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, his legal representative

or his heir may file the necessary papers to complete the same, "but the entry in such cases shall be made in favor "of the heirs of the deceased pre-emptor, and a patent "thereon shall cause the title to inure to such heirs, as if "their names had been specifically mentioned."

The complainant asserts his right to enter the lands in dispute under the provisions of the act of Congress approved March 27, 1854. (10 Stat., 269.) We give here the act in full:

"*Be it enacted*, &c., That every settler on public lands "which have been or may be withdrawn from market in "consequence of proposed railroads, and who had settled "thereon prior to such withdrawal, shall be entitled to pre-"emption at the ordinary minimum to the lands settled on "and cultivated by them: *Provided*, They shall prove up "their rights according to such rules and regulations as "may be prescribed by the Secretary of the Interior, and "pay for the same before the day that may be fixed by the "President's proclamation for the restoration of said lands "to market."

This law relates exclusively to the alternate sections of public lands *reserved to the United States* by the acts making grants for railroad purposes. It cannot be applied to the lands granted. It affects only lands which have been withdrawn from market in consequence of proposed railroads, and which are again to be restored to market "by the "President's proclamation." By an act approved March 3, 1853, (10 Stat., 244,) Congress provided that the pre-emption laws should be extended "over the *alternate re-*"*served sections of public lands* along the lines of all the "railroads" wherever land grants had been or should thereafter be made, the benefit of the act to be extended only to persons who had settled and improved such lands "prior to "the final allotment of the alternate sections to such rail-

"roads," but with a proviso "that the price to be paid "shall in all cases be two dollars and fifty cents per acre, "or such other minimum price as is now fixed by law, or "may be fixed, upon lands hereafter granted."

This act was clearly limited in its application to the alternate sections of land along the lines of the railroads which were reserved from the grants, and did not apply to the granted sections. It was also probably intended to apply to only those persons who settled subsequent to the withdrawal of the lands. But the Land Department construed it as also applying to those who settled previous to the withdrawal, and such pre-emptors were compelled to pay two dollars and fifty cents per acre for lands which were held at minimum price when they made their settlements.

To cure this construction, and to give settlers the lands at the price existing at the time their settlements were made, the law of March 27, 1854, was passed.

To construe this latter act as applying to the sections granted the State for railroad purposes would render the language of the proviso meaningless and absurd. The settler under its terms is only required to pay for the land he claims "before the day that may be fixed by the President's "proclamation for the restoration of said lands to market." The granted lands are not restored to market by the President's proclamation. The settler would never have to pay.

That this is the proper construction of the act in question is confirmed by an examination of the various laws making railroad grants. These acts divide the lands within the fixed limits into what are termed "granted sections" and sections "which remain to the United States." As to the former, it is invariably provided that where any preemption has attached before the definite location of the road, the land is excluded from the grant. As to the latter, it is provided that they shall be withdrawn from mar-

ket and again restored, at double the usual price, *by the President's proclamation*. In other words, the granting acts protect all pre-emption rights on *granted* sections, while the laws of 1853 and 1854 were necessary to protect them on the lands *reserved to the United States*. This construction alone brings the act of 1854 into harmony with the other laws touching the same matter.

We are aware that the Land Department has construed the act as contended for in complainant's bill. This, fortunately, does not change the law nor make a precedent for this court. So violent a construction, and one leading to such absurdities, will not be indulged.

But should it be admitted that the law of 1854 is applicable to granted railroad sections, still the complainant has not brought himself within its acknowledged provisions.

1st. When the land in question was withdrawn from market the complainant was a minor, and could not have been a settler within the purview of the pre-emption laws.

2d. If he claims under any pretended settlement of his mother, we answer, (*a*,) that her right as a pre-emptionist was exhausted in 1854; (*b*,) that there has been an utter failure to "prove up" according to the requirements of the act, and hence any right possibly existing at the time of withdrawal was long since barred.

The Secretary of the Interior prescribed the "rules and "regulations," as authorized by the act, in a circular issued March 22, 1870. (Record, 45.) Parties who had made settlement prior to withdrawal of the land for railroad purposes were required to file their declaratory statements within three months from the first day of June, 1870, *and thereafter make proof and payment, as required by law*. The circular closes with these words:

"Settlers failing to comply with the requirements of this

" circular will be held to have forfeited their claims as pre-
" emptors under the law."

Admitting, *pro argumento*, that the declaratory statement made by Mrs. Nix on the 20th July, 1853, was sufficient, this rule of the Secretary, which had all the force of a law, required the final proof to be made within one year, or by the 22d day of March, 1871. As a matter of fact no attempt of any kind was made to prove a settlement and cultivation of the lands in dispute until the 19th day of January, 1878. (Record, 37.) This proof purports to be made " in obedience to the orders by proclamation of the " President of the United States and the Commissioner of " the General Land Office." The proclamation thus referred to will be found on pp. 9 and 10 of the Record. It was made expressly under the provisions of the act of July 4, 1876, repealing the act of June 21, 1866, which latter act had limited the disposal of the public lands in Arkansas and other Southern States to the provisions of the homestead law.

Evidently, then, it is not such proclamation as was contemplated by the act of 1854. That act simply had in view the usual proclamation restoring to market, at the enlarged price of two dollars and fifty cents per acre, the sections reserved to the United States within railroad grants. Besides, by reference to the proclamation itself, it will be seen that it expressly provides that lands reserved for railroad purposes are excluded from the sale.

It is clear that if the mother of the complainant, or the complainant himself, had any pre-emption right under the law of 1854 it was not, and could not have been, in any way affected by the proclamation relied upon.

There never has been a proclamation restoring the land in question to market. There can be none. The land is on

a granted section, and the title thereto passed from the United States as soon as the line of the road was definitely located. The evidence of such title is found in the certified list made by the Land Department to the State.

R.R. Co. *v.* U. S., 92 U. S., 733.

Schulenberg *v.* Harriman, 21 Wal., 60.

It may be added that while the complainant alleges his right to enter the lands under the act of March 27, 1854, and that the above-mentioned proclamation of President Hayes fixed the time within which final proof and payment should be made, he stultifies himself by tendering two dollars and fifty cents per acre for land, which, if subject to entry as claimed, the act specifically provides shall be at the ordinary minimum price.

II.

It is further alleged by the appellant that he is entitled to the relief sought by his bill under the provisions of certain statutes of the State of Arkansas. This claim remains to be examined.

The substance of all the State enactments affecting the land in controversy has already been given above. These acts were respectively passed in the years 1855, 1856, 1859, and 1871, and will be found on pp. 4, 5, 6, and 9 of this brief.

The law of 1855 is only of interest in this connection as fixing the time when the congressional grant was accepted and the route of the road definitely fixed. The act of 1856 repeals that of 1855, except the provision fixing the line of the road. It re-enacts the grant to the Cairo & Fulton Railroad Company, and then by the 2d, 3d, and 4th sections provides that persons who were settlers on the lands on the 9th day of February, 1853, should have a pre-emtion of not exceeding 160 acres at $2,50 per acre, but the settler is re-

quired to file an affidavit of settlement with the Auditor of State within three months from the time the lands were selected, and a list thereof filed in the Recorder's Office of the County in which the lands lie; also provides that the right of the settler should cease upon failure to file the proof within the time specified.

The Company complied with the terms of this act by filing the required list in the Recorder's Office on the 30th day of January, 1858. (Record, 17.)

The complainant does not pretend that he or his mother filed any proof of settlement as required by the act.

The sixth section of the act of 1866 provided that the Company should, within two years from the passage of the act, either grade twenty-five miles or complete ten miles of its road.

The State Assembly in 1859 repealed this sixth section, and also enacted that any person, who, on the first day of November, 1858, resided on or cultivated any improvement on any of the land comprised in the grant, might purchase the same of the Railroad Company at two dollars and fifty cents per acre, to the extent of one hundred and sixty acres, by complying with the conditions of the act of 1856, the material change being that under the act of 1856 only those who were settlers and occupants on the 9th of February, 1853, were entitled to this preference right to purchase, while under the act of 1859 this date was carried forward to November 1, 1858.

The State enactments of 1855 and 1856 having bestowed the grant upon the Company, it is extremely doubtful whether the Assembly in 1859 could change the terms on which the lands were to be sold, at least without first declaring a forfeiture and entirely resuming the grant.

But conceding that the State continued in control of the

lands up to the act of 1859, the complainant does not pretend to have complied with its conditions.

The lands having been approved to the State for the benefit of the Railroad Company July 13, 1857, (Record, 39,) and lists of the same having been filed with the County Recorder January 30, 1858, (Record, 17,) it became the duty of the claimant, within three months after the passage of the act of 1859, to file with the Auditor of State his own affidavit, accompanied by the affidavits of two disinterested free-holders of his County, describing the land claimed by legal subdivisions, proving the fact of such occupancy, residence, and cultivation; and if the Auditor found such proof sufficient, then, within three months, or as soon thereafter as the Company was in condition to make title, pay for the land. Upon failure to do all this the law declares that claimant's "right to make such purchase shall cease."

The complainant, in his bill, admits that he made no endeavor to comply with the conditions of this law, and excuses himself on the ground that the Company had not filed the requisite lists in the Recorder's Office. The record shows that such lists were filed early in 1858; hence, by his own laches, he was clearly barred from asserting any claim under the provisions of the statute we are now considering.

It is asserted that the complainant secured certain equitable rights under the provisions of the act of March 28, 1871.

In this act the General Assembly again assumes that the control of the land remains in the State. It will be remembered that by the acts of 1855 and 1856 the State had bestowed the lands on the R.R. Co., subject to the conditions of the original granting act, and the further conditions (*a*) that the company should consider certain settlers as having preference rights to purchase the lands they occupied, at $2.50 per acre, and (*b*) should grade twenty-five miles or complete ten miles of the road within two years.

In 1859 the Company was released from the latter condition, and there is no evidence whatever that it had violated any other of its legal obligations. Congress had extended the time to 1876, within which the road was to be finished, and construction was going forward. The grant by Congress to the State, and the grant by the State to the Company, were each grants *in præsenti*. The title to the lands had entirely passed to the Company. The only right remaining in the State was the right to forfeit and re-enter upon condition broken. It is admitted that the road was finally completed as required by the acts of Congress.

While the Company is thus legally proceeding in the performance of its obligations, the General Assembly steps in, by the act of 1871, and undertakes to impose new duties and obligations upon it, and to arbitrarily dispose of its lands. It provides that where any settler who, on or before the *eighth day of March*, 1870, was residing and made improvements on the lands belonging to or claimed by the Cairo & Fulton R.R. Co., should have the right to purchase the same, not to exceed one hundred and sixty acres, including the homestead and improvements of such settler, at two dollars and fifty cents per acre.

The law of 1856 had limited the time within which settlements should be made to secure preference rights of purchase to the settler to February 9, 1853. The law of 1859 moved this date forward to November 1, 1858. This was justified on the ground that the Company had incurred a forfeiture by violating the conditions of section 6 of the act of 1856. It was claimed that by reason of this the State could resume control of the land, and, at its option, fix new conditions of sale. But in 1871 no condition was broken by the Company; no right of forfeiture existed; none was claimed. The Assembly simply arbitrarily attempts to add twelve more years within which any person

settling on the Company's lands could force a sale to himself at a fixed price per acre. We submit that it had no constitutional warrant for such an enactment.

The grant to the Company was a contract which the State could not violate. (Fletcher *v.* Peck, 6 Cranch, 135.) Neither could the act be justified under the right of eminent domain. It does not propose to take the property of the Company for public uses, but bestows it upon other citizens. It is true the settler is required to pay the Company $2.50 per acre. "But the right of eminent domain does not im-
" ply a right in the sovereign power to take the property of
" one citizen and transfer it to another, *even for a full com-*
" *pensation*, where the public interest will be in no way pro-
" moted by such transfer."

Cooley Const. Lim., 530, and authorities there given.

III.

Admitting, for the purposes of the argument, the law of 1871 to be legal and binding upon the Company, the complainant's claim fails for want of compliance with its terms.

He did not reside on and improve the lands which he claims. Admitting that he *improved* them, *residence* upon them was equally necessary. The words of the act are, " where any settler who, on or before the eighth day of
" March, 1870, *was residing and made improvements* on the
" lands belonging or claimed " by the Company shall have the right " *to purchase the same*, not to exceed one hundred
" and sixty acres, under the legal subdivisions of said lands,
" *and including the homestead and improvements of such*
" *settler*."

The right here conveyed was to purchase the land on which he *resided*, and which he *improved*, and the purchase was to include the *homestead* (in the sense of home or actual

residence) and *improvements*. Otherwise, any farmer in the neighborhood could have gone on the lands of the Company, cut down some timber, and then enforced their sale to himself at $2.50 per acre. A man living in the village of Texarkana could have cleared a small portion on a subdivision intended by the Company as the site of their roundhouses and machine-shops, and forced the Company to give it up at the limited price. The act couples the words *residence* and *improvements*, together with the conjunctive "and," and one is as necessary as the other to secure the preference right of purchase.

Mr. Nix has never resided on the lands in dispute. He has always resided on his own lands, to which he holds the undisputed title. He did not improve the lands with the intention of settling them. He was simply a trespasser on the Company's property. He received the deed from his mother of the land which includes his residence in 1858. He has resided there continuously since.

The improvements on the 120 acres which he now claims were almost wholly made in 1869 and subsequent thereto. (Record, 59.) It was undoubtedly the intention of Nix and his mother to confine their improvements, made previous to 1869, to the forty which they had purchased from the United States. If they got beyond the lines of t ıat lot in making their clearings it was because they were in ignorance as to where the lines were. In other words, they deliberately chose their place of residence, purchased it, improved it, and have continued to reside on it. Hence there can be no color of claim that complainant resides, or ever resided, on the land in dispute.

Neither did complainant at any time make a tender to the Company, or its agent, for the 120 acres in controversy. The offer to purchase, upon which he relies, was made by Joseph F. Kirby, acting as agent for Nix, sometime in July,

1874. The complainant, in his deposition, (Record, 48,) says: "Mr. Joseph F. Kirby, who was with me at the "time, and acting as my agent and attorney, spread the "money out on the table, and, to the best of my recollec- "tion, counted the money, to the amount of four hundred "dollars, to James M. Loughborough, agent aforesaid." In the same deposition, on page 49, he says: "He did not "tender the four hundred dollars for the three forties in "controversy above, but for those three *and the N. E. ¼ of* "*the N. W. fr'l ¼ of said section* 30. He made no other "tender for me at the time, save the one of four hundred "dollars for the four forties last mentioned. At no other "time did Mr. Kirby make any tender for me, save the one "above referred to."

Said Kirby in his deposition, found on pages 50 and 51 of the Record, declares that at the time of the alleged tender there was a plat of the land produced and the complainant pointed out to Mr. Loughborough, agent of the R.R. Co., the particular forties of land which he claimed, and which the affiant declares included the northeast quarter of the northwest fractional quarter of said section thirty. This allegation is repeated several times in the deposition. In a subsequent deposition, found on pages 77, 78, and 79, Mr. Kirby repeats the statement, that the N. E. ¼ of the N. W. ¼ was included in the offer to purchase made by Nix.

As to this forty, the complainant testifies on pages 80 and 81, that he never claimed it, and never made any improvements on it.

It is true that in a subsequent affidavit he denies that this tract was included in his offer to purchase of Mr. Loughborough. But he tendered four hundred dollars, and that would be payment for 160 acres. If he was tendering for the lands in dispute, at the fixed price of $2.50 per acre, just $300 would have been sufficient. To explain this dis-

crepancy and, if possible, make his conduct consistent, he now declares that he included the forty which he lived on and had owned for many years. This statement, even if uncontradicted, would be too absurd for belief. Mr. Nix would not offer to pay the R.R. Co. $2.50 per acre for land which it never claimed, and to which he had the absolute title. But in any event the tender was for 160, and not for 120, acres. It was made in gross, and was the only tender made. It is clear the Company could not accept an offer to sell Nix his own land, nor, under the act of 1871, could it be required to sell him, for $2.50 per acre, lands which he says he never claimed or improved. The tender was not good as a whole; it cannot be held good in part. It was properly rejected.

It will also be observed that the railroad ran through two of the three forties in dispute. In the notice (Record, 12) under which claimant alleges he made his tender, lands through which the road ran were expressly reserved from sale. So at most there was but one of the forties (the N.W. ¼ of the N.E. ¼) which was subject to purchase.

The complainant having failed to bring his claim for relief within the provisions of either the State or Federal laws the decree dismissing his bill should be affirmed.

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